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Human resources management

Practice of the Secretary-General in disciplinary matters and possible criminal behaviour, 1 July 2009 to 30 June 2010

Report of the Secretary-General

Summary

The present report is submitted in response to the request of the General Assembly in paragraph 16 of its resolution 59/287 that Member States be informed on an annual basis about all actions taken in cases of established misconduct and/or criminal behaviour and the disciplinary action and, where appropriate, legal action, taken in accordance with the established procedures and regulations. The report covers the period from 1 July 2009 to 30 June 2010, following the establishment of the new system of administration of justice.

The General Assembly is invited to take note of the report.

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I. Introduction

1. The present report is submitted in response to the request of the General Assembly in paragraph 16 of its resolution 59/287 that Member States be informed on an annual basis about all actions taken in cases of established misconduct and/or criminal behaviour and the disciplinary action and, where appropriate, legal action, taken in accordance with the established procedures and regulations. The present report covers the period from 1 July 2009 to 30 June 2010.

2. As requested in paragraph 17 of resolution 59/287, an information circular will be issued so that all staff of the Organization will be informed of the most common examples of misconduct and/or criminal behaviour and their disciplinary consequences, including any legal action, with due regard to the protection of the privacy of the staff members concerned.

3. Effective 1 July 2009, a new system of administration of justice was established pursuant to General Assembly resolutions 61/261, 62/228 and 63/253. The major change in the new system relating to the handling of disciplinary matters is the abolition of the Joint Disciplinary Committees, effective 1 July 2009. The Joint Disciplinary Committees functioned as fact-finding bodies, and made recommendations to the Secretary-General as to the disposition of disciplinary cases, following which a decision was taken on cases. As a result of the abolition of the Joint Disciplinary Committees, decisions on the imposition of disciplinary measures are now taken without the advice of a joint body. A comparison of the handling of disciplinary matters under the former system and the new system is presented in the annex.

4. Also effective 1 July 2009, amended Staff Regulations and provisional Staff Rules were promulgated (see ST/SGB/2009/7). The major change in the provisional staff rules relating to disciplinary matters was the introduction of administrative leave pending an investigation and during the disciplinary process, as set out in provisional staff rule 10.4, which replaced suspension during investigation and disciplinary proceedings under former staff rule 110.2. The change was made to clarify that removal from duty pending investigation and/or disciplinary proceedings was not a disciplinary sanction.

5. A broad overview of the administrative machinery in disciplinary matters in the new system is provided in section II below so that the information provided in sections III and IV can be understood in context. Section III contains a summary of the cases for which one or more disciplinary measures were imposed by the Secretary-General during the reporting period. Section IV contains comparative data reflecting the number of cases referred for action during the reporting period and the disposition of cases that were completed during the reporting period including cases that did not result in the imposition of a disciplinary measure. Section V provides information on the practice of the Secretary-General in cases of possible criminal behaviour.

II. Overview of administrative machinery in disciplinary matters in the new system of administration of justice

A. Legislative framework governing the conduct of staff members[1]

6. Article 101, paragraph 3, of the Charter of the United Nations states that the "paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity".

7. Article I of the Staff Regulations and Chapter I of the provisional Staff Rules, both entitled "Duties, obligations and privileges", set out the basic values expected of international civil servants because of their status, as well as particular manifestations of such basic values. Particular reference is made to staff regulation 1.2 and provisional staff rule 1.2 for specific instances of expected or prohibited conduct.

B. Misconduct

8. Article X of the Staff Regulations provides in regulation 10.1 (a) that "the Secretary-General may impose disciplinary measures on staff members who engage in misconduct". Provisional staff rule 10.1 (a) provides that the "failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct". Additionally, provisional staff rule 10.1 (c) provides that "the decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority". Within these parameters, the Secretary-General has broad discretion in determining what constitutes misconduct and in imposing disciplinary measures. Administrative instruction ST/AI/371/Amend.1, on revised disciplinary measures and procedures,[2] provides further examples of conduct for which disciplinary measures may be imposed.

C. Due process

9. Where the head of office or responsible officer believes, following an investigation, that misconduct may have occurred, he or she refers the matter to the Assistant Secretary-General for Human Resources Management for a decision on whether to pursue the matter as a disciplinary case.[3] Depending on the subject

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[1] Provisions relating to the status, rights and obligations of staff members, and to disciplinary matters, can be found in the electronic Human Resources Handbook under the headings "Status, basic rights and duties" and "Disciplinary".

[2] See also ST/SGB/2008/5, on the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority.

[3] The head of administration in a mission will refer the case to the Department of Field Support at Headquarters, which will refer the matter to the Office of Human Resources Management if it concurs with the mission's assessment.

matter and complexity of an investigation, it can be undertaken by the head of office or his or her designees, or by the Office of Internal Oversight Services, at its own initiative or at the request of a head of office.

10. If the Assistant Secretary-General for Human Resources Management decides to pursue the matter as a disciplinary case, the staff member is notified in writing of the charges of misconduct and is informed of his or her opportunity to comment on the charges and of his or her right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance or from outside counsel at his or her own expense. The staff member is given a reasonable opportunity to respond to the charges of misconduct. In the light of the comments provided by the staff member, the Assistant Secretary-General for Human Resources Management decides whether to close the case, with or without administrative action, or to recommend the imposition of one or more disciplinary measures. In the latter case, the Under-Secretary-General for Management decides, on behalf of the Secretary-General, whether to impose one or more of the disciplinary measures provided for in provisional staff rule 10.2 (a).

11. At any time pending an investigation until the completion of the disciplinary process, the Assistant Secretary-General for Human Resources Management may decide to place a staff member on administrative leave where: there is prima facie evidence that the conduct of the staff member poses a danger to other United Nations personnel or to the Organization; the staff member is unable to continue to perform his or her functions effectively because of an ongoing investigation and the nature of the functions; there is prima facie evidence that continued service by the staff member would create an unacceptable risk that he or she could interfere with the investigation; or the Department of Safety and Security determines that the continued presence of the staff member on United Nations premises could constitute a security risk to the Organization. Decisions of placement on administrative leave without pay are taken by the Under-Secretary-General for Management.

12. In accordance with provisional staff rule 10.3 (c), a staff member against whom a disciplinary measure has been imposed may submit an application before the Dispute Tribunal challenging the imposition of the measure(s) in accordance with chapter XI of the provisional Staff Rules.[4]

13. Further details on the new disciplinary process are contained in the annex.

D. Disciplinary measures

14. Provisional staff rule 10.2 (a) provides that disciplinary measures can take one or more of the following forms (i.e., more than one measure can be imposed in each case):

(a) Written censure;

(b) Loss of one or more steps in grade;

(c) Deferment, for a specified period, of eligibility for salary increment;

(d) Suspension without pay for a specified period;

[4] Judgements of the Dispute Tribunal relating to disciplinary cases can be found on the website of the Office of the Administration of Justice (www.un.org/en/oaj).

(e) Fine;

(f) Deferment, for a specified period, of eligibility for consideration for promotion;

(g) Demotion, with deferment, for a specified period, of eligibility for consideration for promotion;

(g) Separation from service, with notice or compensation in lieu of notice, and with or without termination indemnity;

(h) Dismissal.

15. In determining the appropriate measure, each case is decided on its own merits, taking into account the particulars of the case, including aggravating and mitigating circumstances. In accordance with provisional rule 10.3 (b), disciplinary measures imposed are proportionate to the nature and gravity of the misconduct involved.

E. Other measures

16. Written or oral reprimands, recovery of moneys owed to the Organization and administrative leave with or without pay are not considered disciplinary measures. Reprimands, like warnings or letters of caution, are administrative/managerial measures that are important for upholding standards of proper conduct and promoting accountability. Additionally, where inappropriate behaviour affects performance, the issue is addressed in the context of performance management. This may include training, counselling, withholding of salary increments, non-renewal of contract or termination of appointment.

III. Summary of cases for which the Secretary-General imposed a disciplinary measure during the period from 1 July 2009 to 30 June 2010

17. For each case that led to the imposition of one or more disciplinary measures, a summary is provided below indicating the nature of the misconduct and the disciplinary measure(s) imposed by the Secretary-General. The function of or other particulars relating to the staff member are provided only when they played a role as aggravating or mitigating circumstances in determining the measures to be taken. Conduct issues that were dealt with by means other than disciplinary measures are not listed.

18. Not every case brought to the attention of the Secretary-General results in disciplinary or other measures being taken. When a review by the Office of Human Resources Management reveals that there is insufficient evidence to pursue a matter as a disciplinary case or when a staff member provides a satisfactory explanation in response to charges of misconduct, the case is closed and the staff member is considered cleared of the charges. Cases may also be closed when a staff member retires or is otherwise separated from the Organization before disciplinary proceedings are concluded, as the Secretary-General does not have the authority to impose disciplinary measures on former staff members. In such cases, a record is

made and placed in the former staff member's official status file so that the matter can be further considered if and when the staff member rejoins the Organization.

19. As a consequence of the abolition of the Joint Disciplinary Committees, more time is spent scrutinizing every aspect of referrals for disciplinary action, including obtaining clarifications and/or additional evidence from the staff member concerned and/or the investigating entity in order to ensure, to the greatest extent possible, that recommendations are made and decisions are taken on the basis of a complete record.

A. Abuse of authority/harassment

20. A staff member sexually harassed another staff member, abused his authority with respect to her, and sent her offensive and threatening e-mails and text messages, including through the Organization's information and communications technology (ICT) resources. The staff member also distributed offensive material to other staff, using the Organization's ICT resources. *Disposition*: dismissal. *Appeal*: none filed as at the date of the present report.

21. A staff member abused his authority and sexually harassed an intern who served under his authority. *Disposition*: dismissal. *Appeal*: filed with the Dispute Tribunal, where the case remains under consideration.

B. Assault

22. In the context of an e-PAS discussion, a staff member reacted with aggression to her supervisor's comments and grabbed and pushed her against a wall. *Disposition*: censure, loss of step in grade and deferment for one year of eligibility for within-grade increment. *Appeal*: none.

23. In the course of his official duties as a driver, a staff member reacted aggressively to the comments of another staff member about his performance and driving abilities, and punched the staff member in the jaw. *Disposition*: censure, loss of step in grade and deferment of one year in eligibility for within-grade increment. *Appeal*: none.

24. A staff member physically assaulted a security officer and used profane language in respect of the United Nations and its staff members. *Disposition*: censure (and continued participation in substance abuse counselling). *Appeal*: none.

25. A staff member assaulted two national police officers and resisted arrest after being involved in a motor vehicle accident. *Disposition*: demotion with deferment, for a period of one year, of eligibility for consideration for promotion. *Appeal*: none.

C. Computer-related misconduct

26. A staff member received, stored and distributed e-mails containing pornographic material using the Organization's ICT resources. *Disposition*: censure and demotion of one grade with deferment, for three years, of eligibility for consideration for promotion. *Appeal*: filed with the Dispute Tribunal, where the case remains under consideration.

27. A staff member improperly stored and transmitted pornographic material using the Organization's ICT resources. *Disposition*: loss of two steps within grade, and a two-year deferral of within-grade salary increment. *Appeal*: filed with the Dispute Tribunal, where the case remains under consideration.

D. Financial disclosure

28. Five staff members failed to comply with their financial disclosure obligations for the 2006 reporting period. *Disposition*: censure plus a fine of two months' net base salary. *Appeal*: none.

E. Fraud/misrepresentation

29. A staff member submitted inaccurate claims for rental subsidy allowance to the Organization, supported by forged and falsified documentation; certified the accuracy of such claims in the knowledge that they were not accurate; and knowingly received from the Organization rental subsidy allowances to which he was not entitled. *Disposition*: dismissal. *Appeal*: none.

30. A staff member submitted fraudulent United Nations purchase-order forms that were used to acquire computer equipment and other goods. *Disposition*: dismissal. *Appeal*: none.

31. A staff member made material misrepresentations on her personal history profile form in relation to her educational qualifications. *Disposition*: separation from service with compensation in lieu of notice and with termination indemnity. *Appeal*: none filed as at the date of the present report.

32. A staff member knowingly submitted false information and documentation in support of a claim for medical expenses. *Disposition*: dismissal. *Appeal*: none filed as at the date of the present report.

33. A staff member, after forging the signature of an authorized signatory, attempted to cash a cheque to be drawn from the account of a United Nations-related organization in the amount of $12,500. *Disposition*: separation from service with compensation in lieu of notice but without termination indemnity. *Appeal*: none.

34. A staff member used his office and knowledge gained from his official functions for the private gain of friends and acquaintances by preparing and issuing fraudulent correspondence on the Organization's letterhead to facilitate the entry of those persons into the country of his duty station. *Disposition*: dismissal. *Appeal*: none filed as at the date of the present report.

F. Procurement irregularities

35. A staff member, performing procurement functions, entered into private contracts with, solicited benefits from and failed to disclose a private commercial relationship with companies that did or sought to do business with the Organization. The staff member also engaged in unauthorized outside activities, used the Organization's ICT resources for private gain and for the private gain of third

parties, and knowingly provided false and incomplete financial disclosure information for three consecutive years. *Disposition*: dismissal. *Appeal*: filed with the Dispute Tribunal, where the case remains under consideration.

36. A staff member received benefits from a United Nations contractor and, nevertheless, assessed the contractor's performance under its contract with the United Nations. In addition, the staff member violated established mission procedures for the movement of personnel in the mission area and did not ensure that his attendance records correctly reflected his absences. *Disposition*: dismissal *Appeal*: the staff member challenged the decision before the Dispute Tribunal, which found in favour of the staff member.

G. Sexual exploitation and sexual abuse

37. A staff member, exercising responsibilities that included the authority to hire casual daily workers, engaged in sexual relationships with local women, pursuant to which sexual favours were exchanged for money and/or employment for them, their relatives and/or friends. *Disposition*: dismissal. *Appeal*: none.

H. Theft/misappropriation

38. A staff member stole two flat-screen computer monitors from the Organization. *Disposition*: dismissal. *Appeal*: none.

39. A staff member knowingly misappropriated diesel fuel belonging to the Organization. *Disposition*: separation from service with compensation in lieu of notice, but without termination indemnity. *Appeal*: none.

40. Two staff members stole three Hesco Bastions and 10 rolls of barbed wire belonging to the United Nations. *Disposition*: dismissal. *Appeal*: none filed as at the date of the present report.

I. Other

41. A staff member violated local laws in relation to the possession and attempted smuggling of child pornography. *Disposition*: dismissal. *Appeal*: none.

42. A staff member travelled within the mission area without a valid movement-of-personnel form, was absent from work without authorization, drove a United Nations vehicle during curfew hours and allowed a wrongful payment to be made to a temporary employment firm. *Disposition*: censure and deferment of eligibility for salary increment for a period of two years. *Appeal*: none.

43. A staff member made a bad-faith complaint against two military officers, following a recommendation for the non-renewal of his appointment. *Disposition*: censure. *Appeal*: none.

IV. Summary of cases received and completed during the reporting period 1 July 2009-30 June 2010

A. Cases received by the Office of Human Resources Management

44. The tables and figures in this section provide information on the numbers and types of cases that were referred to the Office of Human Resources Management for action during the reporting period from 1 July 2009 to 30 June 2010.

Cases received by the Office of Human Resources Management during the reporting period

Staff based at United Nations Headquarters and offices away from Headquarters	66
Field staff	101
Total	**167**

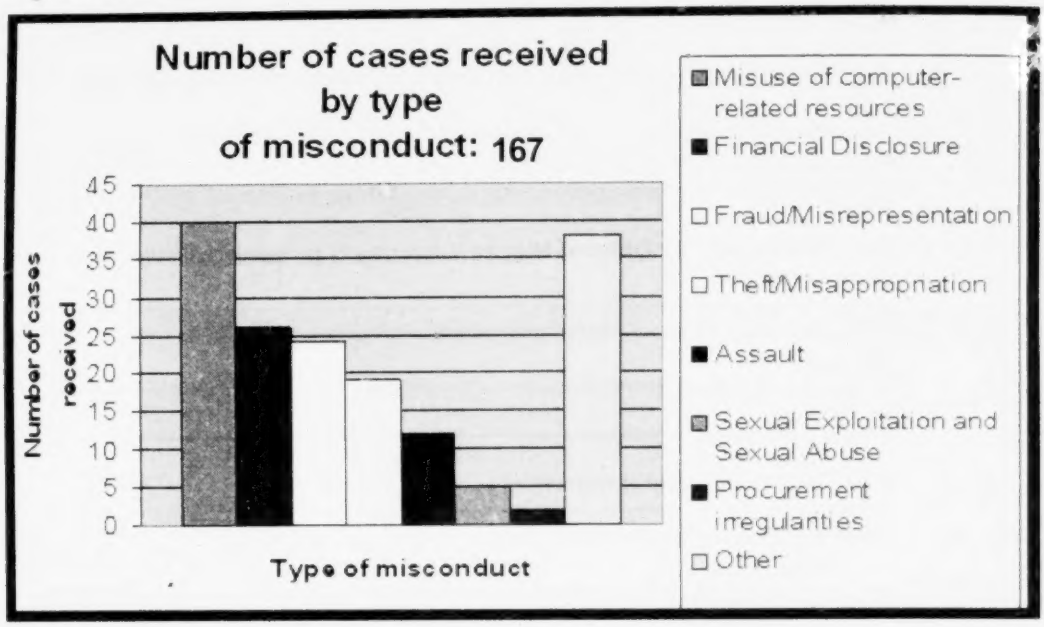
Cases received by type of misconduct

Misuse of computer-related resources[a]	40
Financial disclosure	26
Fraud/misrepresentation[b]	24
Theft/misappropriation	19
Assault	12
Sexual exploitation and sexual abuse	5
Procurement irregularities	2
Other	39
Total	**167**

[a] This includes cases involving pornography, online banking PIN codes and unauthorized use of ICT resources.

[b] This includes cases involving fuel fraud, education grant, forgery, falsification of documents, rental subsidy and telephone PIN codes.

Figure I

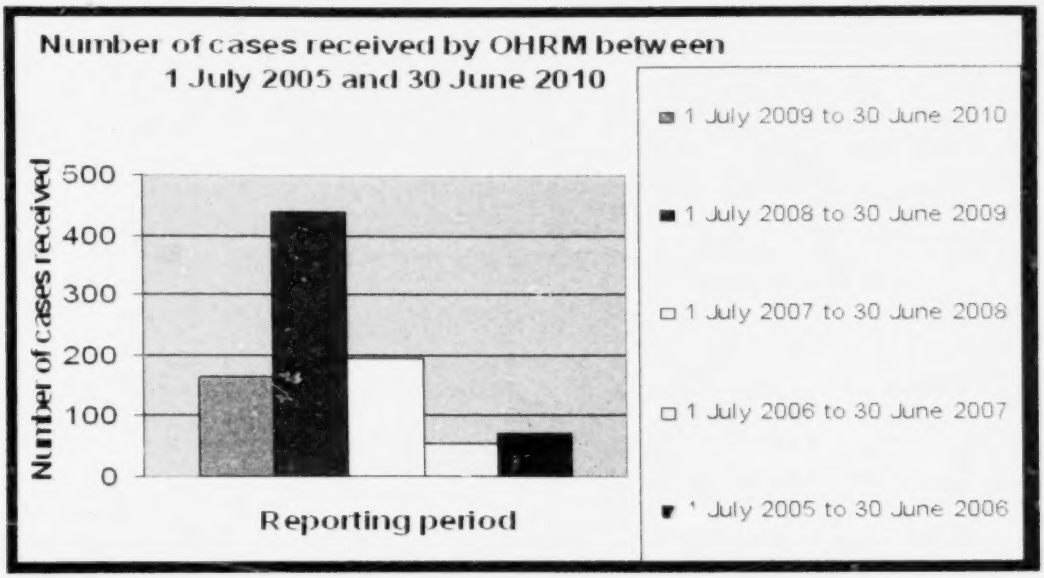


Number of cases received by the Office of Human Resources Management in the past five reporting periods

1 July 2009 to 30 June 2010	167
1 July 2008 to 30 June 2009	440[a]
1 July 2007 to 30 June 2008	198
1 July 2006 to 30 June 2007	56
1 July 2005 to 30 June 2006	73

[a] A number of these cases were related to allegations of misuse of ICT resources and failure to meet financial disclosure obligations.

Figure II


Number of cases received by OHRM between 1 July 2005 and 30 June 2010
Number of cases received
500
400
300
200
100
0
Reporting period
1 July 2009 to 30 June 2010
1 July 2008 to 30 June 2009
1 July 2007 to 30 June 2008
1 July 2006 to 30 June 2007
1 July 2005 to 30 June 2006

B. Cases completed during the reporting period

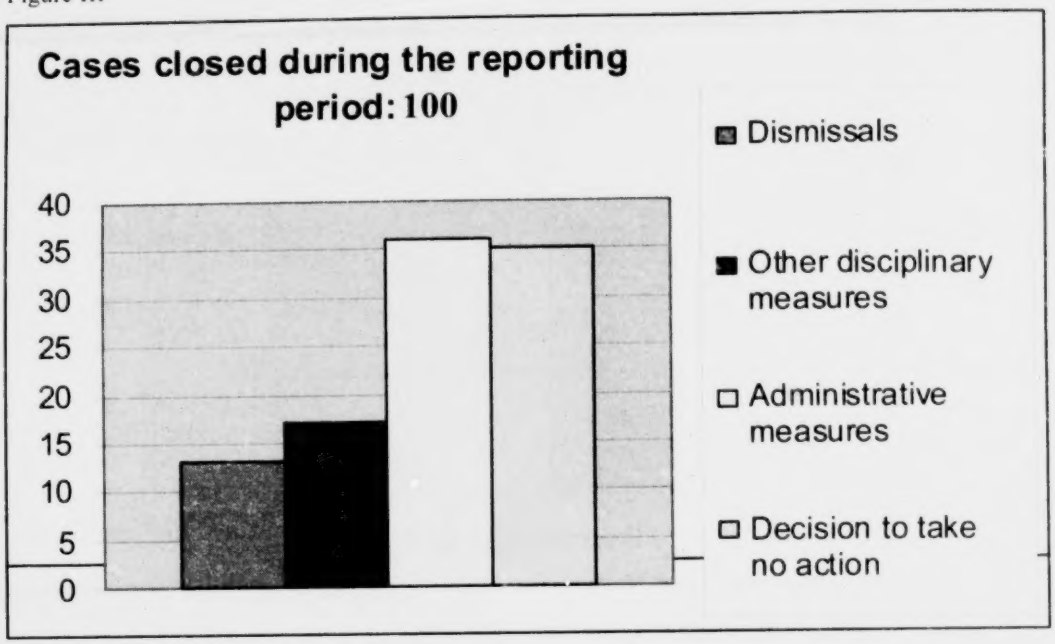
45. The tables and figures in this section provide information on the numbers and disposition of cases completed during the reporting period, including those that did not result in the imposition of a disciplinary measure. It should be noted that, owing to the time required to process disciplinary matters under established procedures, including the need in some cases to obtain further information after the investigation, and the requirement to give staff members an opportunity to provide comments on charges of misconduct, the figures reflect cases completed during the reporting period that had been referred to the Office of Human Resources Management both prior to and during the reporting period.

Disposition of cases completed, 1 July 2009-30 June 2010

Dismissals	13
Other disciplinary measures	16
Administrative measures[a]	36
Decision to take no action after:	
(a) Referral of case to the Office of Human Resources Management and the initial review indicates the initiation of a disciplinary process is not warranted or cannot be sustained	4
(b) Analysis of the entire dossier, including the staff member's comments on the charges of misconduct	21
(c) Separation of the staff member after referral of the case to the Office of Human Resources Management prior to the completion of the disciplinary process	10
Total	**100**

[a] Administrative measures include written or oral reprimands, warnings and letters of caution, all of which are important for upholding standards of proper conduct and promoting accountability. Additionally, where behaviour affects performance, the issue is addressed in the context of performance management, which may include training, counselling, withholding of salary increments and non-renewal or termination of appointment.

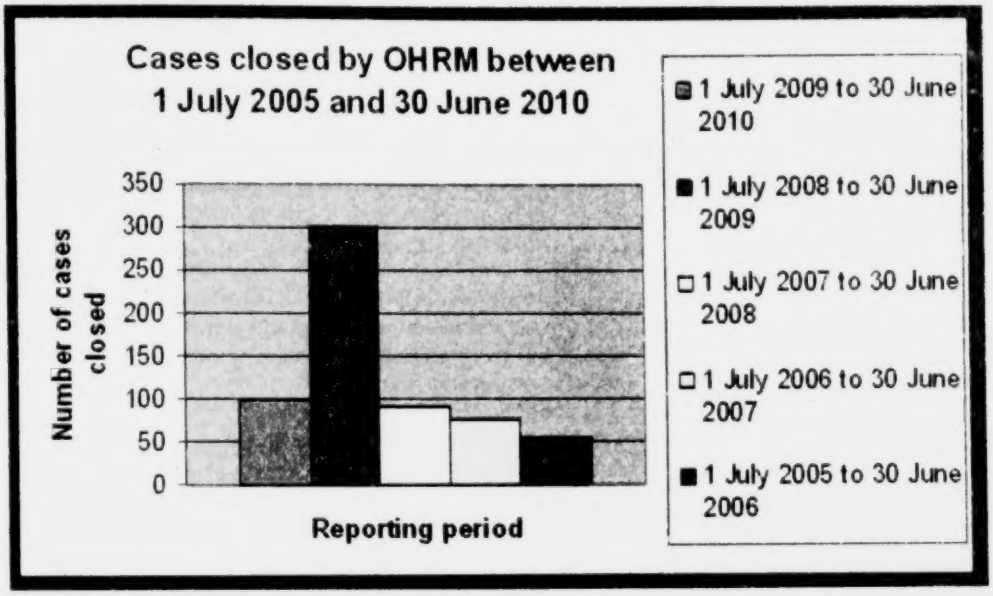
Figure III



Number of cases completed by the Office of Human Resources Management in the past five reporting periods

1 July 2009 to 30 June 2010	100
1 July 2008 to 30 June 2009	301
1 July 2007 to 30 June 2008	90
1 July 2006 to 30 June 2007	76
1 July 2005 to 30 June 2006	54

Figure IV



46. The number of disciplinary cases completed during the 2009/10 reporting period (100) is significantly less than the 301 completed during the 2008/09 reporting period, but is close to the number of cases completed in the prior reporting cycles (see figure IV). The large number of cases completed during 2008/09 was the result of the closure of group cases related to alleged misuse of ICT resources and failure to meet financial disclosure obligations.

V. Criminal behaviour

47. In its resolution 59/287 the General Assembly requested the Secretary-General to take action expeditiously in cases of proven criminal behaviour and to inform Member States about the actions taken. Five cases involving United Nations officials were referred to Member States during the reporting period. As far as the Secretary-General is aware, action has been taken in relation to one of those cases, and a criminal investigation is ongoing in relation to a case that was referred prior to 1 July 2009.

VI. Conclusion

48. The Secretary-General submits the present report to the General Assembly for its consideration.

Annex

Summary of former and current disciplinary processes in the Secretariat[a]

(From reporting to conclusion of disciplinary proceedings)

Process	*Responsible office and actions*
Reporting of incident	
Former	Incidents of possible misconduct were reported to heads of department/office or the Office of Internal Oversight Services, who reviewed the report and determined whether there were sufficient grounds to conduct an investigation
New	Same
Conduct of investigation	
Former	Depending on subject matter and complexity, the investigation was conducted by the Office of Internal Oversight Services or another investigative entity (Department of Safety and Security; panel appointed by a head of department/office; or a panel appointed by the Office of Human Resources Management for complaints of harassment, including sexual harassment, discrimination and abuse of authority where the head of the department/office was the subject of the complaint)
New	Same
Recommendation for removal from duty pending completion of the investigation	
Former	The head of department/office recommended placement on special leave pending investigation, where appropriate. The decision was taken by the Assistant Secretary-General for Human Resources Management for special leave with pay and by the Under-Secretary-General for Management for special leave without pay
New	The head of department/office recommends placement on administrative leave pending investigation, where appropriate. The decision is taken by the Assistant Secretary-General for Human Resources Management for administrative leave with pay and by the Under-Secretary-General for Management for administrative leave without pay

[a] Under ST/AI/371 and ST/AI/371/Amend.1, respectively.

Process	*Responsible office and actions*
Investigation report	
Former	Depending on subject matter and/or complexity, the Office of Internal Oversight Services or another investigative entity conducted the investigation and prepared the investigation report, which was transmitted to the head of department/office
New	Same
Review of investigation report	
Former	Where the head of department/office believed there were grounds to indicate that misconduct had occurred for which disciplinary measures might be imposed, he or she transmitted the report to the Assistant Secretary-General for Human Resources Management for possible disciplinary action and recommended suspension from duty, where appropriate Where the head of department/office believed that no such grounds existed, he or she closed the case and could impose an appropriate administrative measure. If administrative measures were envisioned, the staff member's comments were requested
New	Same
Decision on charging staff member	
Former	The Office of Human Resources Management analysed the investigation report and, where supported by evidence, issued charges of misconduct to the staff member, informed him/her of his/her due process rights and requested his/her comments. Where the Assistant Secretary-General for Human Resources Management believed that no grounds for disciplinary action existed, he or she decided that the case should be closed, with or without administrative measures. If administrative measures were envisioned, the staff member's comments were requested
New	Same
Removal from duty with or without pay	
Former	On the recommendation of the head of department/office, and where appropriate, the Assistant Secretary-General for Human Resources Management placed a staff member on suspension with pay, normally for a period not to exceed three months or until completion of disciplinary proceedings. Where the nature and gravity of the allegations, if established, might have resulted in summary dismissal, the Assistant Secretary-General sought the approval of the Under-Secretary-General for Management to suspend the staff member without pay

Process	*Responsible office and actions*
New	On the recommendation of the head of department/office, and where appropriate, the Assistant Secretary-General for Human Resources Management places a staff member on administrative leave with pay, normally for a period not to exceed three months or until completion of the disciplinary process. Where the nature and gravity of the allegations, if established, would likely result in dismissal, the Assistant Secretary-General for Human Resources Management seeks the approval of the Under-Secretary-General for Management to place the staff member on administrative leave without pay
Review of the staff member's comments	
Former	The Office of Human Resources Management analysed the staff member's comments and obtained any additional information or evidence
New	Same
Decision on further action on the charges	
Former	The Assistant Secretary-General for Human Resources Management decided whether to: (i) Close the case if a satisfactory explanation was provided by the staff member; (ii) Make a decision on the imposition of administrative measures; (iii) Refer the case to a Joint Disciplinary Committee for advice on disciplinary measures; or (iv) Recommend summary dismissal through the Under-Secretary-General for Management
New	The Assistant Secretary-General for Human Resources Management decides whether to: (i) Close the case if a satisfactory explanation is provided by the staff member; (ii) Make a decision on the imposition of administrative measures; or (iii) Recommend to the Under-Secretary-General for Management the imposition of one or more disciplinary measures

Process	*Responsible office and actions*
Decision on disciplinary measures	
Former	The Deputy Secretary-General, on behalf of the Secretary-General, decided on the imposition of disciplinary measures. A decision to summarily dismiss required prior advice from the Office of Legal Affairs. A decision on all other disciplinary measures required prior advice from the Joint Disciplinary Committee, unless waived by the staff member
New	The Under-Secretary-General for Management, on behalf of the Secretary-General, decides on the imposition of disciplinary measures. A decision to dismiss requires prior advice from the Office of Legal Affairs. As the Joint Disciplinary Committees were abolished, effective 1 July 2009, the decision to impose a disciplinary measure is taken without the advice of a joint body
Recourse by staff member	
Former	A staff member had the right to appeal to the Joint Appeals Board (and, if dissatisfied with the outcome, to the United Nations Administrative Tribunal) in respect of administrative measures imposed, or to the United Nations Administrative Tribunal in respect of any decision by the Deputy Secretary-General, acting on behalf of the Secretary-General, to impose a measure after advice from a Joint Disciplinary Committee In cases where the Deputy Secretary-General imposed the disciplinary measure of summary dismissal without prior advice from a Joint Disciplinary Committee, a staff member first had his or her case reviewed by the Joint Disciplinary Committee at Headquarters. The Deputy Secretary-General either confirmed or modified the original decision to summarily dismiss in the light of the Joint Disciplinary Committee report. Thereafter, a staff member had the right to appeal the reviewed decision to the United Nations Administrative Tribunal
New	A staff member has the right to challenge the imposition of a disciplinary or administrative measure before the Dispute Tribunal and, thereafter, to the Appeals Tribunal. The Secretary-General may appeal decisions of the Dispute Tribunal to the Appeals Tribunal, on limited grounds

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The scope and application of the principle of universal jurisdiction

The scope and application of the principle of universal jurisdiction

Report of the Secretary-General prepared on the basis of comments and observations of Governments

Summary

The present report has been prepared pursuant to General Assembly resolution 64/117, by which the Assembly requested the Secretary-General to prepare a report on the basis of information and observations received from Member States on the scope and application of the principle of universal jurisdiction.

* A/65/150.

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I. Introduction

1. The present report has been prepared pursuant to General Assembly resolution 64/117, by which the Assembly requested the Secretary-General to prepare a report on the scope and application of the principle of universal jurisdiction, on the basis of information and observations from Member States, to be submitted before 30 April 2010.

2. Section II gives an overview of comments made by Governments on their general understanding of and certain orientations regarding the subject. Section III, together with the relevant tables found at the end of the report, focuses on specific information on the scope and application of universal jurisdiction, on the basis of relevant domestic legal rules, applicable international treaties, and judicial practice, in accordance with the resolution. Section IV contains a synopsis of issues raised by Governments for possible discussion, together with specific comments.

3. Responses were received from: Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, the Plurinational State of Bolivia, Bulgaria, Cameroon, Chile, China, Costa Rica, Cuba, Cyprus, the Czech Republic, Denmark, El Salvador, Estonia, Ethiopia, Finland, France, Germany, Iraq, Israel, Italy, Kenya, Kuwait, Lebanon, Malaysia, Malta, Mauritius, the Netherlands, New Zealand, Norway, Peru, Portugal, the Republic of Korea, Rwanda, Slovenia, South Africa, Sweden, Switzerland, Tunisia and the United States of America.

II. General observations

A. Context

4. In their observations, some Governments situated the subject within the general rubric of jurisdiction in international law, generally understanding universal jurisdiction to encompass, for purposes of the present subject, "universal criminal jurisdiction" and noting that jurisdiction was closely linked to principles of international law relating to sovereignty and territorial integrity. In particular, the sovereignty of States implied that within its own territory, a State could exercise prescriptive and enforcement (or prescriptive/legislative, adjudicative/judicial and enforcement/executive) jurisdiction to the exclusion of other States. The competence to do so — an important element of State sovereignty — was commonly understood as jurisdiction. As a general rule, the exercise of such competence was limited to the territory of the State. However, the territoriality of criminal law was not an absolute principle; international law did not prohibit a State from exercising jurisdiction extraterritorially. In this connection, attention was drawn to the various bases for establishing criminal jurisdiction: (a) the territorial principle (including subjective and objective territoriality); (b) the nationality ("active personality") principle; (c) the passive personality principle; (d) the protective principle; and then (e) the universal principle.

5. For some Governments, it was important that jurisdiction, irrespective of its basis, was only exercised, in good faith, and consistently with other principles and rules of international law. While perpetrators of serious crimes should be properly and genuinely investigated, prosecuted and punished, it was considered essential that the goal of ending impunity did not in itself generate abuse or bring about

conflict with other existing rules of international law. Such an approach was necessary to enhance the rule of law, meaningfully contribute to peace among nations and ultimately bring justice to victims.

6. It was observed that the State in which a crime occurred (the territorial State) and the State of nationality of the perpetrator (the State of nationality) would generally have primacy, in the fight against impunity, over persons, acts or things. As such, each State should proscribe serious crimes under its domestic law, and exercise effective jurisdiction over such crimes when committed on its territory or by its nationals. It was argued that the territorial State was often best placed to obtain evidence, secure witnesses, enforce sentences, and deliver the "justice message" to the accused, victims and affected communities.

7. Governments also highlighted that one of the major achievements in international law in recent decades had been the shared understanding that there should be no impunity for serious crimes. International cooperation was constantly being strengthened and new measures taken to ensure that perpetrators of such crimes were brought to justice. These efforts had led to concrete outcomes, giving practical recognition to international criminal jurisdiction, as well as to prosecutions based on universal jurisdiction.

8. As regard the former, attention was drawn to the establishment of ad hoc criminal tribunals, of a diverse variety, as well as to the Rome Statute of the International Criminal Court. While support was expressed for such arrangements, noting that the international criminal justice system afforded a range of complementary mechanisms not only to end impunity but also to maintain international peace and security, it was acknowledged by some Governments that such bodies had their own jurisdictional and practical limitations.

9. At the same time, it was recognized that serious crimes of international concern still went unpunished within the scope of territorial or national jurisdiction, including by alleged perpetrators becoming fugitives across borders, heightening, in part, the importance and resurgence of universal jurisdiction. In their comments, several Governments affirmed their commitment to promoting accountability and viewed universal jurisdiction as constituting an essential jurisdictional instrument in the fight against impunity. It was underlined that universal jurisdiction should be exercised in accordance with recognized rules of international law, not least those providing fundamental rights and guarantees for the accused. It was considered equally important that judicial independence and impartiality be safeguarded to ensure that the principle of universal jurisdiction was not manipulated for political ends.

B. Rationale

10. It was observed in some comments that doctrinally the rationale for universal jurisdiction was based on the idea that certain crimes were so serious that they affected the whole international community, or that the crimes in question were universally condemned or were harmful to international interests, with the result that States were obliged to bring proceedings against the perpetrators. The nature or exceptional gravity of such crimes rendered their suppression a joint concern of the international community. Consequently, every State had the right to exercise its jurisdiction to prosecute the perpetrators.

11. In a sense, universal jurisdiction was viewed as an additional complementary mechanism in the collective system of criminal justice. It ensured that a State would take action, on behalf of the international community, where a serious crime of international concern had been committed, and other States which had jurisdiction were unable or unwilling to act, and where international courts and tribunals lacked the jurisdiction or practical means to prosecute the perpetrators. While the invocation of universal jurisdiction by national courts was viewed as a rarity, it was suggested that this was not because of lack of regard to the seriousness of the crimes concerned but rather an indication of prosecutorial preference to ground jurisdiction on other mandatory bases. The point was made that there was an element of subsidiarity to universal jurisdiction, which did not obtain in the classic types of extraterritorial jurisdiction.

C. Definition

12. In their comments, several Governments offered their understanding of the meaning of universal jurisdiction. Of the definitions presented, there were several variations, although they substantially alluded to the same notion embracing the irrelevance of proof of a nexus with the forum State when determining competence. In some examples, reference was made to the general prescriptive assertions of universal jurisdiction as being: (a) the jurisdiction to try serious crimes committed abroad irrespective of the law of the locality where the offence took place and of the nationality of the perpetrator or the victim; (b) the competence to exercise criminal jurisdiction over those individuals responsible for the most serious crimes of international concern regardless of where the conduct occurs; (c) the authority to bring criminal charges against an individual under the national law of any State regardless of the nationality of, or the State in which, the individual committed the crime; (d) the possibility of criminal prosecution for the commission of a serious crime, regardless of where it was committed, the nationality of the accused or the victim, or any other link between the crime and the State where prosecution takes place; or (e) the legal principle allowing or requiring a State to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim.

13. In other situations, the focus was on the nature of the crime. Universal criminal jurisdiction was one, based solely on the nature of the crime regardless of the nexus between the place of commission of the crime, the alleged perpetrator and the country of prosecution. It was also defined deductively by excluding the other bases for establishing jurisdiction, in which case universal jurisdiction implied a criterion for the attribution of jurisdiction that was recognized by international law whereby States may prosecute certain international crimes without having to prove a jurisdictional link, either (a) to the territory where the crime was committed, the nationality of the perpetrator or the nationality of the victims; or (b) regardless of the location in which the offence took place, the nationality of either the victim or the perpetrator, or the effect of the crime on the State exercising jurisdiction.

14. In yet some other instances, the focus was narrower and specific to the enforcement or adjudicatory aspects of jurisdiction, referring to (a) the ability of a national judge to bring proceedings and rule on certain crimes committed on foreign soil, by foreign nationals and against foreign nationals; or (b) the ability of a court to exercise its jurisdiction even in the absence of a link between the case and the

forum State, such as territory, nationality of perpetrator or victim, or infringement upon the fundamental interests of the State.

15. In some comments, the point was made that national legislation attributed extraterritorial jurisdiction in relation to certain offences, usually in relation to the implementation of international agreements containing obligations to criminalize certain acts and ensure that offenders were prosecuted or extradited. Although these agreements were often described as creating "universal jurisdiction", it was considered that the extraterritorial jurisdiction assumed pursuant to such instruments was different from universal jurisdiction in that limits remained on the circumstances in which jurisdiction might be exercised. In particular, the exercise of jurisdiction was limited to criminal acts having some link with the forum State.

D. Distinctions drawn in respect of universal jurisdiction

16. In this connection, comments were also made drawing a distinction between universal jurisdiction that was absolute, unlimited or unconditional and universal jurisdiction that was conditional or limited. The former, inter alia, allowed for the exercise of universal jurisdiction in criminal proceedings by default or in absentia, without the perpetrator being present in the territory of the forum State. The latter applied once one or several conditions for the reasonable exercise of extraterritorial jurisdiction would have been fulfilled, the common factor being the presence of the alleged offender in the territory of the forum State. Additional considerations, based on the specificities of a national jurisdiction, included the prohibition of extradition of the alleged offender to the territorial State or State of nationality, or the need for a specific request or consent of a duly designated authority. Some Governments stressed that, as a general rule, universal jurisdiction within their jurisdiction could only be exercised when the perpetrator was present in their territory at the time when formal legal proceedings were initiated.

17. In another instance, attention was drawn to a distinction between universal legislative jurisdiction, which may be exercised through the enactment of a domestic law and universal contentious jurisdiction concerning the investigation and trial of accused persons. It was noted that the former was prevalent and more acceptable in State practice and was generally a sine qua non for subsequent investigation and trial. On the other hand, a court could in principle also found its jurisdiction, directly on the basis of international law, to exercise universal contentious jurisdiction without relying in any way on domestic legislation.

E. Universal jurisdiction and *aut dedere aut judicare*

18. Observations were made by some Governments cautioning against confusing universal jurisdiction with the obligation to extradite or prosecute (*aut dedere aut judicare*). As a general matter, it was noted that universal jurisdiction was a basis for jurisdiction only and did not itself imply an obligation to submit a case for potential prosecution. In that sense, universal jurisdiction was quite distinct from the obligation to extradite or prosecute, whose implementation, according to some comments, was subject to conditions and limitations set out in a particular treaty containing the obligation.

19. Universal jurisdiction involved a criterion for the attribution of jurisdiction, whereas the obligation to extradite or prosecute was an obligation that was discharged once the accused was extradited or once the State decided to prosecute an accused based on any of the existing bases of jurisdiction.

20. Stemming from the above, divergent conclusions were drawn in the comments. On the one hand, the point was made that, on a closer examination of relevant treaties, it was misleading to assert that universal jurisdiction was established by treaty in all instances, in particular for offences such as terrorism and drug trafficking, where there was an obligation to extradite or prosecute. State parties to such treaties were under a mandatory duty, as a treaty obligation, to establish criminal jurisdiction on the basis of the territoriality or nationality principle, and, even where there was a discretion, the instruments in question founded jurisdiction on the basis of the passive personality principle, the protective principle, or because the offences were committed by a stateless person who had habitual residence in the State in question. The obligation to extradite or prosecute could be established in a treaty for any type of crime, without such crimes necessarily being subject to universal jurisdiction. Thus, although, under the relevant treaty, there was an obligation on a State party where an offender was found to prosecute or extradite an offender, the jurisdictional basis arose from the obligation to criminalize the treaty offences and establish jurisdiction on the basis of established grounds as specified in the treaty. The principle of *aut dedere aut judicare* did not in itself establish universal jurisdiction for that particular treaty-based offence.

21. On the other hand, it was noted that the obligation to prosecute or extradite was inextricably linked to universal jurisdiction, particularly when the latter is understood in its conditional or limited sense, as quasi-universal. While universal jurisdiction was a legal principle, it could also be an obligation as a result of a treaty. States parties to a treaty that included an *aut dedere aut judicare* obligation should incorporate universal jurisdiction into their legislation, without prejudice to the possibility of judicial bodies in monist States exercising jurisdiction on the direct basis of international law. Moreover, by being party to a treaty incorporating *aut dedere aut judicare*, a State may exercise jurisdiction, as appropriate, even if it was entirely unconnected to the crime itself. Depending on the facts of the case, if the State was not in a position to extradite such individual, the right to exercise jurisdiction could become an obligation as a result of the *aut dedere aut judicare* provision, since as State party, it would be under obligation to prosecute. On this basis, it was noted, for example, a number of universal counter-terrorism instruments, for instance, the 1997 International Convention for the Suppression of Terrorist Bombings, provided the obligation to prosecute on condition of non-extradition. In this context, it was also considered useful to note that most of the universal counter-terrorism conventions excluded from their scope offences committed exclusively within a single State, where the offender and the victims were nationals of that State, the alleged offender was found in the territory of that State, and no other traditional basis for another State to assert jurisdiction would apply.

22. Some other treaties oblige States parties to establish their jurisdiction, even universal jurisdiction, and to prosecute the perpetrators of crimes covered by these treaties, whether or not there has been a request for extradition by another State. States were at liberty to extradite suspects, however, if they did not wish to prosecute them. This type of *aut dedere aut judicare* obligation was found, in

particular, in the Geneva Conventions of 1949, in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

F. Universal jurisdiction and international jurisdiction

23. Some Governments distinguished universal jurisdiction from international criminal jurisdiction. While sharing the same aim of ensuring that perpetrators of certain crimes do not enjoy impunity, the two were complementary but not interchangeable. Whereas States exercise universal jurisdiction, international criminal jurisdiction pertained to international tribunals. It was observed that the granting of jurisdiction over certain crimes to international judicial bodies did not constitute a legal basis for a State to establish universal jurisdiction over such crimes.

24. Nevertheless, a number of comments drew attention in particular to the relationship between universal jurisdiction and the Rome Statute of the International Criminal Court. For some Governments, the legitimacy of universal jurisdiction in their countries was borne out by the measures deployed at the domestic level to ratify and implement the Rome Statute, including steps taken to establish universal jurisdiction as a basis for asserting jurisdiction, in respect of clearly defined crimes of international concern and providing the means of enforcement allowing the national courts to exercise jurisdiction over such crimes.

25. The point was made that universal jurisdiction may be exercised not only by States but also by international criminal tribunals and other criminal justice bodies.

G. Universal jurisdiction and *jus cogens* norms

26. It was suggested that greater attention should be paid to the relationship between universal jurisdiction and acts concerning prohibitions or acts which had a *jus cogens* character. In particular, it was necessary to determine whether crimes whose prohibition rose to the level of *jus cogens* were subject to the exercise of universal jurisdiction, and whether such jurisdiction was optional or compulsory. It was pointed out that crimes under the Rome Statute, which also invoked the application of universal jurisdiction, had a *jus cogens* character.

H. Crimes under customary international law concerning which universal jurisdiction may be invoked

27. Some Governments also cited examples of crimes in relation to which universal jurisdiction may be invoked. Under customary law, it was noted, it was generally understood that universal jurisdiction applied to piracy. To prevent impunity and to deny them safe havens, pirates were considered *hosti humanis generis*. Universal jurisdiction for piracy had been reaffirmed by the 1982 United Nations Convention on the Law of the Sea.

28. Some Governments observed that customary law also extended universal jurisdiction for other crimes such as slavery, genocide, war crimes, crimes against

humanity, crimes against peace, and torture, while some others additionally mentioned the prohibition against apartheid. The nuanced position in some other comments was that although universal jurisdiction extended to serious crimes of international concern, such as genocide, war crimes and crime against humanity, the exercise of jurisdiction in other cases was based on treaty or statute and accordingly only binding on parties thereto. It was nevertheless recognized that certain States enacted domestic law to claim extraterritorial jurisdiction over such crimes and premised the legality of such legislation on the basis of universal jurisdiction.

III. Scope and application of universal jurisdiction on the basis of the relevant domestic legal rules, applicable international treaties, and judicial practice

29. In their comments on the applicable legal rules, some Governments provided general information on the constitutional and other basis for the application of international law within the domestic legal order, as well as specific information on rules applicable for establishing jurisdiction generally and, in some cases, universal jurisdiction in particular.

A. Constitutional and other domestic legal framework

30. In the occasional comments on this point, Governments revealed varied practice, although broadly drawing on the dichotomy between indirect and direct applicability of international law in the domestic sphere. In some instances, it was noted that there was a different treatment accorded based on the source of the obligation: customary international law was generally considered to be part of the law of the States concerned (unless it was inconsistent with the Constitution or Acts passed by the legislature). This in itself opened the possibility, at least theoretically, for universal jurisdiction in relation to an international crime, under custom, being exercisable domestically (e.g., South Africa). In respect of treaty obligations, some Governments noted that in order to have effect in domestic law, international obligations would have to be incorporated either through legislation (e.g., Australia, Belarus, South Africa), including the adoption of legislation regulating the procedural conditions for implementation of the principle (e.g., Belarus), or by application of the common law (e.g., Australia).

31. On such basis, it was noted that, *ratione materiae*, serious crimes of international concern, including genocide, war crimes, crimes against humanity, piracy, slavery and torture were comprehensively criminalized under domestic law. Moreover, appropriate authorities were accorded the legal authority to investigate and prosecute such crimes, including on the basis of universal jurisdiction (e.g., Australia). Indeed, it was indicated that it would be the act incorporating the crimes in question into domestic law that would provide the basis for jurisdiction, and not necessarily the principle of universal jurisdiction as such (e.g., South Africa).

32. In cases of direct applicability, there was no constitutional requirement for additional domestic legislation to be passed in order to implement any treaties to which the States concerned were party, even though in some instances specific

legislation was passed in practice (e.g., the Republic of Korea). It was noted that some constitutions expressly provided that treaties to which the State concerned was party formed part of domestic legislation (e.g., Peru) or that duly concluded and promulgated treaties and generally recognized rules of international law would have the same effect as the domestic law (e.g., the Republic of Korea) or that any agreements approved or ratified by the President of the State had greater authority than national laws (e.g., Tunisia). Thus, the absence of an express provision on universal jurisdiction, would not prevent the courts from it on that basis, since, in accordance with the constitutional framework, treaties and customary international law incorporating universal jurisdiction had the same standing within the particular jurisdiction as the constitution or domestic law (e.g., Republic of Korea, Peru, Tunisia). In other situations, international instruments in question became part of domestic law when they had entered into force on the domestic plane, in accordance with their provisions and of the constitution (e.g., El Salvador), namely, once a decree of ratification was issued by the legislature to ensure entry into force of a particular treaty and the domestic application of its provisions (e.g., El Salvador). Accordingly, the authority to exercise universal jurisdiction, even outside the legislative basis in domestic law, was stated as extant and viable by virtue of an international normative framework for obligations assumed that authorized some States to observe the principle, especially in relation to war crimes, consistent with obligations under the Geneva Conventions of 1949 (e.g., El Salvador).

33. Some Governments indicated that international human rights instruments had constitutional status within their domestic legal order and that, if they contained rights more favourable than those contained in the constitution such rights applied in preference to those in the constitution (e.g., the Plurinational State of Bolivia, Costa Rica) or that the constitutions in question provided that laws relating to the rights and liberties recognized by those constitutions would be interpreted in accordance with the international human rights norms and international human rights treaties ratified by the States concerned (e.g., Peru). To that end, it was asserted that, once the State had become party to certain human rights instruments, the principle of universal jurisdiction could be inferred from such instruments, for example, in cases of systematic and widespread practice of torture, forced disappearance of persons, genocide or apartheid (e.g., the Plurinational State of Bolivia).

B. Criminal regulatory framework

34. The most extensive information was provided in relation to the criminal law regulatory framework. It was noted, at least in one case, by a Government that its courts had universal jurisdiction over any crime falling within the category of international or cross-border crimes, such as genocide, war crimes, crimes against humanity, torture, money-laundering, piracy and drug trafficking (Rwanda). In another instance, it was noted that universal jurisdiction was not enshrined in the law, while observing further that domestic legal rules and judicial practice had not adopted the principle (Lebanon). In most cases, however, references were made to penal or criminal codes, codes of criminal procedure and specific legislation which had given effect to international obligations, as providing the basis for the exercise of universal jurisdiction. As a general caveat, it should be noted that there were occasions in which references were made to legislation which had general attributes of extraterritoriality in respect of particular offences.

1. Penal or criminal codes, codes of criminal procedure or criminal law

35. There were cases where issues concerning the application of universal jurisdiction, usually along side other bases of jurisdiction, were provided for, either expressly or impliedly, in their domestic penal codes (e.g., Austria, the Plurinational State of Bolivia, Bulgaria, Cameroon, Costa Rica, Estonia, El Salvador, Ethiopia, Iraq, Israel, Malaysia, Norway, Peru, Slovenia, Sweden, Switzerland), including the military penal codes (e.g., Switzerland), the Penal Law (e.g., Israel), criminal codes (e.g., Armenia, Australia, Azerbaijan, Belarus, Belgium, the Czech Republic, Cyprus, Denmark, Finland, Germany, Italy, Malta, the Netherlands, Portugal, Slovenia, the Republic of Korea) or codes of criminal procedure (e.g., Armenia, Belarus, Belgium, Cameroon, France, Germany, Iraq, Norway, Sweden, Tunisia), or the criminal law (e.g., China) or acts on powers of judiciary, such as courts acts (e.g., Mauritius) or Courts of Judicature Act (e.g., Malaysia).

Material scope of enabling provisions

36. As in the case of the constitutional framework, the comments revealed varied practice, demonstrating a range of enabling provisions with respect to the scope *ratione materiae*, which can broadly be presented into two overlapping categories, sometimes within the same jurisdiction. The various formulations generally cast jurisdiction as exercisable in respect of (a) a crime against international law; or (b) an international crime specified in domestic legislation, or a crime specified in a treaty, to which the State had adhered.

A crime against international law

37. In some situations, under the codes, criminal jurisdiction was exercised in regard to offences against international law (e.g., Belgium, Ethiopia) or the codes specified such crimes (e.g., Azerbaijan, Belarus, Belgium, Cameroon, Estonia, Malta, Netherlands, Norway), for example, piracy, genocide, crimes against humanity, grave violations of the Geneva Conventions of 1949 or other violations of international humanitarian law committed in international or non-international armed conflict. In other cases, the codes defined a "crime against international law" or "an international crime" by expressly mentioning the crimes in question or by reference, for example, to the commission of any act which was contrary to international humanitarian law under international treaties adhered to by the State concerned (e.g., Costa Rica) or more broadly to a serious violation of a treaty or an infraction of a generally recognized principle or tenet relating to international humanitarian law concerning armed conflicts. This formulation invoked the possibility of treaties, as well as customary international law concerning international humanitarian law being applicable in the determination of whether a "crime against international law" had been committed (e.g., Sweden).

38. In some cases, the exercise of universal jurisdiction for genocide was implied from a general provision that accorded the exercise of universal jurisdiction over offences where the least severe punishment prescribed was imprisonment for four years or more (e.g., Sweden).

39. In some other situations, comments were made that reforms of the codes were under way, which would then include a specific chapter on crimes against international law, including genocide, crimes against humanity and war crimes (e.g., the Plurinational State of Bolivia) or to ensure full compliance with the Rome

Statute (e.g., Costa Rica, Sweden, Switzerland), including definitions of crimes contained therein (e.g., Costa Rica).

International offence specified in domestic legislation or international offence specified in international treaty, to which the State is a party

40. In some examples, the codes applied universal jurisdiction in respect of specific crimes as stipulated in the codes (e.g., Iraq). Thus, the codes conferred jurisdiction over certain crimes, irrespective of the nationality of the perpetrator or victim or where the offences were committed (e.g., Armenia, Australia, Austria, Azerbaijan, Belarus, Cameroon, Iraq), or the codes contained a general provision that universal jurisdiction may be accorded by special legislation (e.g., Italy).

41. There were also situations in which jurisdiction was expressly extended by the codes to any offence concerning which the States in question had a right or an obligation to prosecute under a treaty or under other applicable rules of international law (e.g., Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Cameroon, China, Costa Rica, Cyprus, the Czech Republic, Denmark, Estonia, Ethiopia, Finland, Germany, Israel, Italy, Malta, Norway, Peru) or in relation to offences which affected property internationally protected by specific agreements or rules of international law or seriously undermined universally recognized human rights (e.g., El Salvador). Additionally, the codes, on some occasions, would require that an international agreement be incorporated into domestic law and the provisions of the treaty should give national courts the jurisdiction to prosecute and sentence the person suspected of committing the offences addressed in the treaty. In practice, in the latter case, the jurisdiction of the courts was limited by the need to incorporate into domestic law the international agreements giving jurisdiction to the national judges (e.g., France). Thus, in accordance with a treaty which was referred to in the code, any person who committed one of the crimes listed in the code would be prosecuted in the courts of the forum State (e.g., France). In yet some other cases, further provisions on the application of the enabling rules were issued by decree (which would set out a detailed list of crimes to which the law could be applied on the basis of universal jurisdiction, as well as of treaties providing the legal basis thereof) (e.g., Finland).

42. Through such provisions, States concerned were also able to implement their treaty obligations, including the Rome Statute, resolutions or decisions of the Security Council or decisions and directives of other international institutions to which they were members (e.g., Denmark).

43. Moreover, specific laws had been passed to give effect to United Nations resolutions relating to counter-terrorism (e.g., South Africa), or establishing international criminal tribunals for certain serious crimes committed in particular territories, in which case universal jurisdiction was limited *ratione materiae*, *ratione temporis* and *ratione loci* (e.g., France).

44. In other related situations, although universal jurisdiction was not as such provided for, and there was a general tendency to rely on territorial jurisdiction, the codes nevertheless provided that it would apply to crimes which the State was required by treaty to punish, even if they were not committed within the territory or that the territorial jurisdiction would apply subject to the exceptions laid down in international law. It was understood that such provision left open the possibility of applying the universal principle in accordance with international treaties or agreements ratified by the State (e.g., Armenia, the Plurinational State of Bolivia) or

to crimes which were so grave and directed at the interests of the State or affect the rights and freedoms of its nationals (e.g., Armenia).

The range of offences proscribed in domestic codes

45. The domestic codes provided for a wide range of crimes; these included a general specification concerning a crime against international law or an international crime specified in domestic law, or treaty to which the State concerned was party (e.g., Ethiopia) or to any criminal act that the State concerned had a right or an obligation to prosecute under agreements with foreign States or under other applicable international law (e.g., Norway). In some cases, the classification was more specific, covering such crimes as piracy; slavery and associated offences; fiscal offences; genocide; crimes against humanity; crimes against peace; war crimes; torture; apartheid and discrimination; terrorism-related offences; safety of United Nations and associated personnel; offences against State symbols and State representatives; offences against public morals, or exploitation; and crimes concerning computer and communications fraud.

46. **Table 1** contains a list of crimes as contained in various codes as mentioned in the comments by Governments.

2. Specific legislation

47. In some jurisdictions the proscribed conduct or the application of universal jurisdiction was the subject-matter of specific legislation. In some comments, it was clarified that the general principle was that the courts had territorial jurisdiction, unless the law expressly provided for extraterritorial jurisdiction, hence the need for specific legislation (e.g., Mauritius).

48. Some Governments made general statements that there were a number of statutes that provided for jurisdiction where the only tangible link to the particular crime was the alleged presence of the perpetrator in their territory (e.g., the United States).

The range of offences proscribed by the specific legislation

49. Governments indicated that specific legislation had been passed in relation to such crimes as piracy; genocide; crimes against humanity; torture; war crimes, including war crimes against persons, war crimes against private property and other rights, war crimes against humanitarian operations and emblems, war crimes concerning illegal methods of war, and war crimes concerning illegal means of war; terrorism-related offences; offences concerning mercenary activities; and crimes relating to narcotic drugs and psychotropic substances. Reference was also made to legislation to implement the Rome Statute.

50. **Table 2** contains an indication of specific legislation, based on information submitted by Governments.

3. Applicable international treaties

51. In their comments Governments mentioned a number of international instruments as relevant to the subject, with some noting that the treaties incorporated *aut dedere aut judicare* provisions which they were bound to implement. In some instances, it was clarified that the international instruments

defined crimes falling under the scope of the Penal Code (e.g., Bulgaria). In other instances, Governments refrained from presenting a list, noting that the list of treaties which embodied universal jurisdiction was extensive (e.g., Denmark). The observation was also made that the Government concerned was not bound by any treaty related to the principle of universal jurisdiction (e.g., Lebanon).

52. The instruments referred to were of a universal, regional or bilateral nature, covering such areas as piracy, genocide, international humanitarian law, international criminal law, torture, apartheid, acts of terrorism, narcotic drugs and psychotropic substances, corruption, money-laundering and transnational organized crime, the safety of United Nations and associated personnel, enforced disappearances, the non-applicability of the Statute of limitations, road transportation offences, as well as extradition and mutual assistance in criminal matters.

53. **Table 3** contains a list of the treaties referred to, on the basis of information by Governments, including treaties containing *aut dedere aut judicare* provisions.

4. Customary law

54. Some Governments noted that they accepted that customary international law permitted the exercise of universal jurisdiction over the most serious crimes under international law, which included genocide, crimes against humanity, war crimes, torture, piracy (e.g., Belgium, Malta, Slovenia), and slavery or trafficking in persons (e.g., Belgium), while in some other instances it was noted that there was a subset of crimes such as piracy, genocide and torture, for which the authority to exercise universal jurisdiction derived, at least in part, from a recognition of the offence as a universal crime under customary international law (e.g., the United States). Other Governments noted that universal jurisdiction under customary law existed only with regard to piracy (e.g., China, Malaysia).

5. Judicial and other practice

55. In some instances, it was noted that there had been no cases of application of universal jurisdiction (e.g., Armenia, the Plurinational State of Bolivia, Chile, the Czech Republic, El Salvador, Estonia, Kenya, Malta, Peru, Slovenia), that no prosecutions had been pursued under legislation providing for universal jurisdiction (e.g., New Zealand), that the courts rarely exercised it (e.g., Republic of Korea), or that no one had been convicted since the legislation containing crimes for which universal jurisdiction would be asserted entered into force (e.g., Azerbaijan, the Netherlands). It was also noted that there had been no cases in which extradition had been requested on the basis of universal jurisdiction (e.g., Peru).

56. In a 2008 judgement, the Constitutional Court of **Peru**, in a general reference to the exercise of universal jurisdiction, said that "it is a jurisdiction that does not take into account the nationality of perpetrator or victims, or the place where the crime was committed, when determining the competence of a given State's courts to prosecute acts considered to be contrary to the interests of mankind as a whole".

57. **Belgium** reported that to date, four trials relating to acts committed during the 1994 genocide in Rwanda had been held before the Brussels Assize Court in 2001, 2005, 2007 and 2009. These cases were opened wholly or partly on the basis of the universal jurisdiction of Belgian courts and their investigation went smoothly

because of very close cooperation between the Belgian and Rwandan judicial authorities. In addition, several dozen cases concerning grave violations of international humanitarian law were still at the stage of information-gathering or investigation and could, in the years to come, lead to new trials. However, only some of these cases were based on the universal jurisdiction of Belgian courts, the suspect being present in Belgian territory.

58. In February 2003, a piracy case was tried in the Shantou Municipal Intermediate People's Court in **China**. During the trial, the Court ascertained that 10 Indonesians had hijacked a Thai oil tanker off Malaysia and had been apprehended by Chinese police while disposing of the stolen goods in Chinese territorial waters. In accordance with article 9 of the Criminal Law of China, the Court exercised the jurisdiction prescribed for the aforementioned crime on the basis of the United Nations Convention on the Law of the Sea and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, both ratified by China, and convicted and sentenced the accused in accordance with the provisions of Chinese criminal law.

59. In one 1995 case in the Supreme Court in **Denmark**, the accused, present in Denmark when the charges against him were raised, was accused of having committed in Croatia serious violence against fellow inmates in a camp for war prisoners, in which the accused was exercising limited authority. The acts were held to be punishable under the Third and the Fourth Geneva Conventions. In accordance with the relevant provisions of the Criminal Code, the violations were subject to the jurisdiction of Denmark. As such it was obliged under the relevant conventions to exercise criminal jurisdiction. The defendant was sentenced to eight years' imprisonment and was subsequently expelled.

60. In **France**, there were some ongoing cases, three of which involved acts of torture committed in Algeria, Cambodia and the Republic of the Congo. In relation to Cambodia, in January 2010, an Investigation Chamber of the Paris Court of Appeal handed down a ruling approving the pursuit of investigations for a case concerning acts of kidnapping followed by acts of torture and disappearance, committed in Cambodia between 1975 and 1979.

61. There were also 15 cases ongoing in France concerning acts committed in Rwanda in the context of laws passed to implement the statutes of the international criminal tribunals for Rwanda and for the former Yugoslavia; 14 of these cases were before the High Court of Paris, while the remaining one was before the Army Tribunal of Paris, since members of the French military were implicated.

62. **Rwanda** noted that in 2006, a French judge issued arrest warrants for nine Rwandan officials, including President Paul Kagame, linking them to the killing of Rwanda's former President, whose plane crashed in 1994. In the view of Rwanda, this was an odd indictment by any legal standard and constituted abuse of universal jurisdiction, pointing out that the judge, for example, did not consider alternative theories, did not visit Rwanda, did not conduct any investigation of his own, concocted evidence later denied by his own witnesses, and used evidence of fugitives from the genocide in Rwanda. Rwanda noted that, in the meantime, a large number of suspects of genocide who were subject of international arrest warrants, were in France; instead of using universal jurisdiction to try such persons, the judge had elected to indict the leadership of Rwanda.

63. Under the Criminal Code of the **Netherlands**, its courts have universal jurisdiction over the crime of piracy. On that basis, a case against suspected pirates arrested off the coast of Somalia was currently pending.

64. , In one 1984 case in the **Republic of Korea**, reported as relevant to universal jurisdiction, a group of Chinese nationals hijacked a Chinese domestic aircraft in flight; after inflicting gunshot wounds on several flight attendants, they forced the plane to land at a regional airport of the Republic of Korea. The Supreme Court ruled that, while jurisdiction primarily belonged to the State of registration, considering articles 1, 3, 4 and 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the forum State could also claim concurrent jurisdiction since the hijacked aircraft landed on its territory. Accordingly, a domestic Special Criminal Law, the Aircraft Navigation Safety Act, was deemed applicable to the foreign hijackers. Even though the court's ruling made no explicit mention of universal jurisdiction, it was the guiding principle that led the court to assert jurisdiction in this case.

65. In the *F. N.* case in **Switzerland**, a 2000 ruling of the Military Court of Appeal and a 2001 decision of the Military Court of Cassation, the accused, F. N. (a national of Rwanda), was convicted by the Swiss military courts of war crimes committed in Rwanda against foreign nationals.

C. Conditions, restrictions or limitations to the exercise of jurisdiction

1. General considerations

66. In their comments, some Governments also highlighted conditions, restrictions or limitations to the exercise of jurisdiction either generally or in respect of universal jurisdiction. It was observed that the legitimacy and credibility of the principle of universal jurisdiction was best ensured by its responsible and judicious application, noting in particular that legislation and judicial practice, in the context of universal jurisdiction cases, generally accorded respect to other principles of international law, as well as recognized that it was a mechanism of last resort, which should, as a matter of policy, respect the priority of States with primary jurisdictional links.

67. There were also general assurances that the constitutional guarantees and international norms and standards for the protection of human rights would be respected and the rights of the accused assured (e.g., Costa Rica, Slovenia), including the guarantees against double jeopardy (e.g., Belarus, Slovenia). Moreover, the usual excuses, defences of criminal responsibility would apply irrespective of the basis of jurisdiction (e.g., Australia).

68. Some comments emphasized that the applicability of the penal provisions was subject to the limitations of international law (e.g., Norway). It was noted that if a binding agreement, statute or regulation for some reason restricted the scope of application of the criminal law of a State, their provisions would apply and restrict the scope of application of the domestic law, on the basis of generally recognized rules of international law (e.g., Finland, Norway). In other instances, the implementing legislation would provide the necessary limits (e.g., Italy).

Absolute and conditional universal jurisdiction

69. In some situations, drawing upon the distinction between absolute and conditional universal jurisdiction, it was noted that certain crimes were subject to absolute universal jurisdiction, while others were subject to conditional universal jurisdiction. However, no clear patterns were discernible. For example, it was noted that crimes concerning fiscal matters and the crime of terrorism were subject to absolute universal jurisdiction, while conditional universal jurisdiction was required for crimes such as genocide, crimes against humanity, war crimes, incitement to war and recruitment of mercenaries. (e.g., Portugal). Yet in other instances, the reverse situation was true: crimes such as genocide, crimes against humanity, war crimes and torture were designated as "unrestricted", meaning that absolute universal jurisdiction would apply (e.g., Australia); while in another category of cases, such as sexual servitude, deceptive recruiting for sexual services, trafficking in persons and debt bondage, the exercise of jurisdiction depended on whether the accused was a national, a resident or a body corporate of the State concerned (e.g., Australia).

Broad prosecutorial discretion

70. It was noted in some comments that, even in cases where States had the authority to assert universal jurisdiction, irrespective of whether custom or treaty recognized such authority, States had broad prosecutorial discretion in determining whether to assert it in a specific case. This was increasingly reflected in State practice, where appropriate safeguards had been applied so as to ensure a careful and responsible exercise of universal jurisdiction and to prevent its abuse for political ends. It was also noted that there were often prudential or other reasons why States would refrain from exercising such jurisdiction, including, as appropriate, deferring to a State on whose territory the crime was committed. Since such crimes in particular injure the community where they had been perpetrated, the bulk of the evidence would usually be found in that territory, and prosecution within the territorial State may contribute to the strengthening of rule of law institutions in that State.

71. Moreover, in some jurisdictions, there was a general guarantee that the State had control over prosecutions, since prosecutions were brought by prosecutors and not by private parties, who were barred from filing criminal complaints with the courts, or such prosecutions were subject to consent of a duly designated authority. In some cases, prosecution was only instituted when required in the public interest (e.g., Denmark, Norway) or if the interests of the State concerned were affected (e.g., Austria). Under some legislations, the public prosecutor would assess whether an indictment should or should not be initiated. Such an assessment included the consideration of whether a successful prosecution would entail disproportionate difficulties, costs, or time constraints or whether there were mitigating circumstances that would make the indictment, if proceeded with, unreasonable (e.g., Denmark). In some instances, the law provided for several grounds which may justify a decision not to initiate proceedings or a decision on inadmissibility taken either by an indictment division, at the behest of a federal prosecutor (for example that the complaint was manifestly unfounded; the facts cited in the complaint did not correspond to the classification of offences set forth in the relevant code; the complaint could not result in an admissible case), or directly by a federal prosecutor (where it was apparent from the specific circumstances of the case that, in the interests of the proper administration of justice and in respect for international

obligations of the State concerned, the case should be brought either before international courts, or before the court in the place where the acts were committed, or before a court of the State of which the perpetrator was a national or of the place where he could be located, in so far as such court demonstrated the attributes of independence, impartiality and equity which accorded, in particular, with the relevant international commitments of the States concerned) (e.g., Belgium).

72. Further, it was noted that prosecutors had the power to suspend court proceedings at any stage where continuation would be seriously detrimental to the State or would be in conflict with overwhelming public interests (e.g., Germany).

73. In cases of concurrent jurisdiction, the legitimate interest of the forum State in exercising jurisdiction would often be balanced against the interests of other States in retaining jurisdiction, taking into such consideration all relevant facts of the case, as well as evidence of the state of international law at the time the specific jurisdictional issue arose (e.g., Denmark).

2. Specific conditions, restrictions or limitations

Seriousness of offence

74. In some countries, universal jurisdiction was reserved for serious crimes (e.g., Switzerland) or restricted to particular crimes as so specified and not to any other crimes (e.g., Iraq).

Jurisdictional link

75. The application of universal jurisdiction, in some jurisdictions, was contingent upon the fact that no other jurisdiction has a stronger jurisdictional link, or upon the establishment of jurisdictional link to the forum State, such as nationality or residence or presence of the perpetrator or victims on the territory (e.g., South Africa, Tunisia). In some cases, the requirement of a "close link" (e.g., domicile, ordinary residence, asylum-seekers or refugees) attached to specific crimes, such as war crimes (e.g., Switzerland), although it was also noted that such a requirement may have to be abandoned as a consequence of obligations assumed under the Rome Statute (e.g., Switzerland).

76. In certain countries, prosecution was subject to the presence of the alleged perpetrator in the territory of the State asserting jurisdiction at the time the proceedings were initiated (i.e., the person was arrested or found in the territory) (e.g., Austria, Cameroon, the Czech Republic, Denmark, France, Malaysia, the Netherlands, Norway, Slovenia, South Africa, Switzerland, the United States), or prosecutors would decide not to proceed if the alleged perpetrator was not present or his presence was not to be expected (e.g., Germany). Presence was linked to specific crimes (e.g., Cameroon, the Republic of Korea), including piracy, human trafficking, slave trade or drug trafficking (e.g., Cameroon), or financing of terrorism, money-laundering and crimes against the safety of maritime and air traffic (e.g., Tunisia).

77. In some instances, trials in absentia were prohibited (e.g., Costa Rica) or avoided (e.g., Israel), as contrary to constitutional guarantees of due process (e.g., Costa Rica), while in some jurisdictions the presence of the accused during the conduct of the trial was generally required (e.g., Australia, Malaysia).

Consent or authorization of an appropriate authority

78. Several Governments noted that, as a general rule, a criminal case concerning an offence committed abroad would not be tried unless there was an order from a Prosecutor-General (e.g., Finland), some direction from the Office of the Public Prosecutor (e.g., Cameroon, the Czech Republic, Germany) or the Director General of Public Prosecutions (e.g., Norway) or (written) consent or authorization of the Attorney-General (e.g., Australia, Israel, New Zealand), or the Minister of Justice (e.g., Iraq, Malta). In exercising discretion as to whether a prosecution should proceed, it was observed that regard may be had to a variety of matters, including considerations of international law, practice and comity, prosecution action that was being, or might be brought, in a foreign country (e.g., Australia) and other matters of public interest (e.g., Australia, Israel).

Ne bis in idem

79. It was noted, in some cases, that universal jurisdiction may properly be applied only to cases where the accused had not been tried for the same offence, at either the national or the international level or, at least account would be taken of penalties already imposed abroad for an offence concerning which universal jurisdiction applied (e.g., El Salvador). Moreover, it was indicated that an offender may not be prosecuted if a definitive judgement of guilt or innocence had been pronounced by a foreign court, if a sentence had been served in full or if the conviction had been legally overturned (e.g., Ethiopia, Iraq). It was also noted that persons convicted of crimes falling within the scope of universal jurisdiction may be accorded credit for time already served abroad, whether under arrest, in detention or in prison (e.g., Iraq). Further, the offender would not be subjected to a more severe punishment than that stipulated under the law of the State on whose territory the crime was committed (e.g., the Czech Republic, Slovenia).

80. In some countries, double jeopardy did not apply where there was a determination that it was an international crime or where the judgement rendered abroad was not based on a request from the forum State (e.g., Finland) or if, subject to the permission of a designated authority, the act was not punishable in both States at the time an act was committed, it was considered a criminal offence according to the customary rules and principles recognized by the international community (e.g., Slovenia).

Double criminality

81. In some jurisdictions, there was a requirement for double criminality (e.g., Austria, Cameroon, Denmark, Slovenia, Tunisia). For an act to be punishable in the forum State, it should also be punishable under the law in force on the territory where it was committed (e.g., the Czech Republic). However, there were other countries where double criminality did not apply (e.g., Iraq) or did not apply with respect to certain crimes such as torture (e.g., Cameroon), genocide, terrorism, piracy, crimes against humanity, war crimes, ecocide, the production or proliferation of weapons of mass destruction and the application of prohibited methods of war (e.g., Armenia, Slovenia), financing of terrorism and money-laundering (e.g., Tunisia).

Extradition or surrender and mutual request for assistance

82. In a number of situations, there were linkages to the general regime for extradition and mutual assistance in criminal matters. On that basis, there were instances in which it was observed that there was a general prohibition of extradition of nationals (e.g., Armenia, Azerbaijan, Tunisia) or when there were serious reasons to believe that a person if extradited could be subjected to torture (e.g., Armenia) or the death penalty (e.g., Azerbaijan), unless assurances were given that the death penalty would not be carried out (e.g., Armenia). The imposition of certain sentences, including the death penalty (e.g., Azerbaijan, Costa Rica, Malta) or life imprisonment, could serve as an impediment to extradition or surrender (e.g., Costa Rica).

83. In some cases, a prosecution would proceed, in the exercise of universal jurisdiction, if the perpetrator was not extradited or surrendered (e.g., Austria, Azerbaijan, Cameroon, the Czech Republic, Denmark, Portugal, Slovenia, Switzerland), including to the International Criminal Court (e.g., Costa Rica, Malta). It was also noted that extradition for purposes of prosecution or serving a prison term would have to be founded on an international treaty (e.g., Belarus, Portugal, Tunisia), warrant (e.g., Portugal) or reciprocity (e.g., Belarus, Tunisia). Moreover, for a request for extradition to be effected, the offence should be punishable with imprisonment for a period surpassing a certain threshold or, if the offence was punishable with the death penalty, such a penalty should obtain in both the requesting and the requested State (e.g., Malaysia). In some cases, for purposes of extradition, offences of universal jurisdiction provided for by international conventions already ratified are considered ordinary law offences (e.g., Cameroon).

84. Some Governments reported that a request for mutual assistance would be founded if the offence to which the request related was serious, the requesting State had jurisdiction, and the offence met the double criminality requirements (e.g., Malaysia).

Jurisdiction applied subject to cumulative conditions

85. Some Governments indicated that jurisdiction was established once several cumulative conditions were met, such as: (a) presence of the alleged offender within the jurisdiction; (b) double criminality; (c) a request by an appropriate authority; (d) there was no extradition request or the request was denied; and (e) the offence in question carried an established minimum of a number of years of sentence (e.g., Austria, Cameroon, the Czech Republic, Denmark, Italy, Portugal, Slovenia, Switzerland).

86. In some instances, the conditions were weighed generally in favour of the perpetrator; and would not be prosecuted (a) if he had already served the sentence imposed on him in the foreign country or if it was decided in accordance with an international agreement that the sentence imposed in the foreign country was to be served in the forum State; (b) if the perpetrator had been acquitted by a foreign court or if his sentence had been remitted or the execution of the sentence had fallen under the statute of limitations; or (c) if according to foreign law, the criminal offence concerned may only be prosecuted upon the complaint of the injured party and such complaint had not been filed (e.g., Slovenia).

Pardons and amnesties

87. Some Governments indicated that penal law reforms were under way which would necessitate that pardons or amnesties would not be applicable to international crimes or crimes committed against persons or property protected by international law as defined in their domestic codes (e.g., Costa Rica).

Immunity

88. Some Governments noted that to the extent that the exercise of jurisdiction with reference to some provisions in their codes was limited by applicable international law, the immunity of State officials and diplomatic immunity would be implicated (e.g., Denmark).

89. Some Governments noted that, when ratifying the Rome Statute, the issue arose regarding the applicability of the Statute to persons enjoying immunity under their constitutional framework, and it was advised that relevant constitutional chambers had considered that the existence of such an immunity did not prevent the simultaneous introduction of proceedings in the International Criminal Court along with immunity and impeachment proceedings in domestic courts (e.g., Costa Rica).

Non-application of the political exception clause

90. In some instances, it was noted that the political exception clause did not apply to certain offences such as terrorist crimes (e.g., Tunisia) or that there were reforms which would entail that serious crimes as listed in the domestic codes (corresponding to crimes under the Rome Statute) would not be considered political crimes or ordinary crimes related to political crimes or crimes for which punishment was being sought for political reasons (e.g., Costa Rica).

91. In other cases, it was noted that the discretion whether or not to try an accused who committed a political offence abroad in the forum State vested in the Minister of Justice. Noting, however, that the true rationale for such a rule was to protect the interests of the State, it was considered doubtful that international crimes could be characterized as political offences within the meaning of the laws concerned (e.g., Italy).

Non-application of the statute of limitations

92. Some Governments provided information about the non-application of the statute of limitations to the criminal prosecution of persons who commit certain crimes proscribed under their laws (e.g., Azerbaijan, Belarus), including under the constitution (e.g., the Plurinational State of Bolivia). Such crimes included genocide (e.g., Belarus, the Plurinational State of Bolivia), crimes against peace, war crimes and crimes against humanity (e.g., Azerbaijan, Belarus, the Plurinational State of Bolivia), treason (e.g., the Plurinational State of Bolivia), terrorism, financing of terrorism (e.g., Azerbaijan).

93. In some other countries, reforms were under way to effect changes that would provide for the non-application of the statute of limitations for certain crimes (e.g., Costa Rica).

3. Judicial and other practice

94. **Belgium** noted that the application of the Act of 16 June 1993, transposing into its law the system of suppression established by the Geneva Conventions of 1949 and the Additional Protocols of 1977, as extended to the crime of genocide and crimes against humanity by an Act of 10 February 1999, and according absolute universal jurisdiction in order to suppress the most serious crimes affecting the international community, in practice gave rise to a number of problems. These derived from the combined application of several provisions, namely the possibility of initiating proceedings in absentia, initiating a case by instituting civil indemnification proceedings before an examining magistrate, and the exclusion of immunities as an obstacle to prosecution. This broad field of application entailed a politicization of the law, which was considered improper. Moreover, the entry into force of the Rome Statute necessitated a reduction in the extraterritorial sphere of jurisdiction of Belgian courts so that they would not routinely enter into potential competition with the International Criminal Court, in the application of complementarity. Accordingly, the Act of 16 June 1993 was repealed by the Act of 5 August 2003. However, the Act of 5 August 2003 left intact the substantive law of the 1993 and 1999 Acts. Moreover, the rules on the jurisdiction of Belgian courts were still broad, as a result of an adaptation of the general law of extraterritorial jurisdiction to the realities of modern international crime. At the same time, the Act of 5 August 2003 modified the procedure for applying to Belgian courts by providing that prosecutions, including investigations, could be undertaken only at the request of the federal prosecutor, who assesses the complaints made. The procedure of instituting civil indemnification proceedings was abandoned, with the exception of cases where an offence was perpetrated wholly or partly in Belgium or where the alleged perpetrator of an offence was Belgian or resided primarily in Belgium. When he received a complaint, the federal prosecutor referred it to the examining magistrate for investigation. Furthermore, in order to take into account the jurisprudence of the International Court of Justice in the *Case concerning the Arrest Warrant of 11 April 2000*, the Act of 5 August 2003 included in the preliminary chapter of the Code of Criminal Procedure the principle of respect for the rules of international treaty and customary law in respect of immunity from jurisdiction and execution.

95. In the **Czech Republic**, attempts had been made to apply the *aut dedere aut judicare* obligations in practice without success, usually on account of failure by the requesting State to provide sufficient evidence for prosecuting the alleged offender in the requested State, following the denial of extradition or by reason of application of the statutes of limitations.

96. Also in the Czech Republic, in another case, upon being denied an extradition request for execution of sentence, the requesting State successfully requested that the Czech Republic take over such execution of sentence.

97. In a 1998 case in **Denmark**, the Prosecutor General considered the scope of the Criminal Code, following a report by a group of nationals of Chile, resident in Denmark, to the police accusing the former President of Chile, Augusto Pinochet, of having ordered, designed, or upheld a regime, in which the applicants had been exposed to arrest, torture and degrading treatment in Chile during the years 1973 to 1988. At the time of the police notification, the former President was in the United Kingdom.

98. After thorough consideration of, inter alia, the preparatory works of the relevant provisions of the Criminal Code, the Prosecutor General concluded that Denmark lacked jurisdiction in the specific case, owing to the fact that the alleged perpetrator had not been present in the territory at the time when formal legal proceedings would otherwise have been initiated against him. This understanding of the relevant provisions of the Criminal Code was subsequently upheld by the Ministry of Justice.

99. In **Finland**, a case was currently pending before the District Court; the accused was residing in Finland and was arrested as his name had appeared on a list of suspects published by the authorities of the State of his nationality. It was found that the person concerned could not be extradited under the law of Finland, and therefore he was charged in Finland, on the basis of universal jurisdiction.

100. In **France**, two individuals were convicted on the basis of "quasi-universal" jurisdiction: (a) In a 2005 ruling, the Court of Assizes of the Gard sentenced Ely Ould Dah, a national of Mauritania, to 10 years' imprisonment and 15,000 euros in damages and interest for each of his victims, for acts of torture committed in Mauritania between 1990 and 1991. The conviction led to an application before the European Court of Human Rights, with the applicant, relying on article 7 of the European Convention on Human Rights (no penalty without law), alleging that he had been prosecuted and convicted in France for an offence committed in Mauritania, whereas he could not have foreseen that French law would override Mauritanian law. In a 2009 decision, the European Court of Human Rights concluded that France had not misinterpreted the legality principle guaranteed in article 7; (b) In a 2008 ruling, the Court of Assizes of the Bas-Rhin convicted Khaled Ben Said, a national of Tunisia, to eight years' imprisonment for having ordered, while he was Police Commissioner, the torture of a Tunisian woman at the police station in Jendouba in 1996. The Office of the Public Prosecutor, which had requested acquittal, has appealed the decision and the appeal was still pending before the Court of Assizes of Meurthe-et-Moselle.

101. In the **Netherlands**, several cases were brought in recent years under the international crimes legislation applicable prior to the entry into force of the 2003 International Crimes Act. Besides, two cases against Dutch nationals were premised on universal criminal jurisdiction, the defendants — one Congolese, three Afghan and two Rwandan nationals — being present in the Netherlands in each case.

102. In 2006, an attempt was made in **New Zealand** to bring a private prosecution under section 8 (1) of the International Crimes and International Criminal Court Act against Moshe Ya'alon, a former Israeli general who was visiting New Zealand. An arrest warrant for him was issued by a District Court judge in Auckland. Pursuant to the Act, the consent of the Attorney-General was necessary in order to proceed with the prosecution. The Attorney-General declined to give his consent on advice that the evidence against the general was insufficient to warrant a prosecution. The prosecution was permanently stayed by the Attorney-General, and arrest warrants were extinguished on 28 November 2006 (*Wakim v. Ya'alon*, District Court, Auckland).

103. Although the **United States** had not conducted fully a comprehensive review of its practice, it was aware of few examples of prosecutions based solely on the principle of universal jurisdiction, where there was no other link between the United

States and the offence charged except that the alleged offender was present before the court.

104. In 2003, the United States district court in Hawaii convicted a Chinese national of stabbing a Chinese captain and first officer of a Taiwanese-owned, Seychelles-flagged, all Chinese-crewed fishing vessel, while in international waters. After the fishing vessel made its way into United States waters, the defendant was indicted under the United States statute implementing the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (18 U.S.C. § 2280).

105. In two other cases, although United States law would have permitted prosecution based solely on the principle of universality and the offenders' presence in the United States, alternative bases for jurisdiction were invoked.

106. In 1998, Ramzi Yousef was convicted of a number of charges relating to his role in the 1993 bombing of the World Trade Center in New York City and conspiracy to bomb a series of United States commercial airliners in South-East Asia in 1994 and 1995. Among the many charges against him for his role in plotting and executing attacks on the United States, Yousef also was convicted of placing and causing the detonation of a bomb aboard Philippines Airlines Flight 434, while en route from Manila to Japan. In the final analysis, the appellate court determined that the protective principle provided the basis for United States jurisdiction.

107. In 2008, a United States court convicted Charles "Chuckie" Taylor, Jr., son of former Liberian President Charles Taylor, of torture and related crimes committed in Liberia between 1999 and 2003 under his father's regime. Although the United States torture statute (18 U.S.C. § 2340A) provides jurisdiction regardless of the nationality of the offender based on the offender's presence in the United States, Taylor was also a United States citizen.

IV. Nature of the issue for discussion

108. In their comments and observations, some Governments expressed their views on the nature of the issue. Some comments focused on the positive and negative aspects of universal jurisdiction in terms of its scope and application. On the positive side, it was noted that the perpetrators of heinous crimes were prosecuted in various jurisdictions, sending a clear signal that the perpetrators of such crimes will not be accorded safe havens. It also served to complement international jurisdiction. On the negative side, it was noted that universal jurisdiction may be invoked selectively, on the basis of political motivations, to target particular individuals and was thus prone to abuse. Moreover, it was suggested that its application tends to be expensive, time-consuming, and inefficient.

109. Some Governments expressed their continuing concerns as to the application of universal jurisdiction, particularly when used selectively or arbitrarily, without due regard to requirements of international justice and equality. The unwarranted use of universal jurisdiction could have negative consequences for the rule of law at the international level, as well as in international relations. It was stressed that the principles enshrined in the Charter of the United Nations, in particular the sovereign equality and political independence of States and non-interference in the internal affairs of States, as well as the immunity of high-level officials under international law, should be scrupulously respected in judicial proceedings. Indeed, the comment

was made that to the extent that there was no clear permission under international law, the unilateral exercise of universal jurisdiction against foreign officials by the judicial organs of a State violated the principle of sovereign equality of States, and constituted a breach of international law, engaging the responsibility of a State.

110. Several Governments acknowledged that the exercise of jurisdiction on the basis of universal jurisdiction was controversial in doctrine and in practice, observing that there were divergent views on the type and range of crimes for which it could be invoked, as well as the requirements and the conditions for the exercise of universal jurisdiction. In particular, there was no universally accepted and clear definition of universal jurisdiction, fostering a continuing debate on such issues as (a) the crimes concerning which universal jurisdiction would apply; (b) whether the presence of an accused in the State exercising jurisdiction was always required; (c) whether some "connecting link" with the State seeking to invoke such jurisdiction was necessary.

111. It was recognized in some comments that the fight against impunity was a common goal shared by States; opening up discussions on universal jurisdiction would enable Governments to better appreciate the scope of the principle in international law. While expressing a willingness to participate in discussions on the subject, some Governments expressed a preference for a cautious approach. It was also noted that the subject was not entirely new in the work of the Sixth Committee, it having been addressed indirectly in connection with other items, including the work of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind and on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)". Moreover, in recent years, the question had been taken up in depth by the International Law Association (London, 2000), the Institute of International Law (Krakow, 2005) and the International Association of Penal Law (eighteenth Congress, held in Istanbul, 2009). Accordingly, in addressing the subject it would be necessary to take into account any such previous and ongoing work.

112. Procedurally, it was suggested that a working group of the Sixth Committee be established to identify the similarities in how States treated universal jurisdiction, based primarily on the information they provided in response to General Assembly resolution 64/117.

113. On the other hand, it was pointed out that, from a long-term perspective, consideration of the subject should be entrusted to the International Law Commission. The Commission was already considering the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", which was closely and inextricably linked to universal jurisdiction.

114. Some Governments made more specific comments:

Belgium

It might be interesting to study the subsidiary nature of universal jurisdiction in more detail, particularly by comparing subsidiarity with the principle of complementarity (the basis for intervention by the International Criminal Court).

Chile

The main points to be taken into consideration when determining the scope and application of universal jurisdiction were:

(a) The explicit recognition that, in matters relating to criminal jurisdiction, the principle of territoriality prevailed. Hence, as a general rule, it was the courts in the State in which the crime was committed that should first assume jurisdiction to investigate and punish crimes against humanity, war crimes and genocide;

(b) In order for universal jurisdiction to apply, a State's competence to establish its jurisdiction and prosecute an individual must have a solid basis in international law — usually in the form of a treaty;

(c) Universal jurisdiction cannot be based exclusively on the domestic legislation of the State seeking to exercise it, unless such jurisdiction is also based on a source of international law;

(d) A State cannot proceed to exercise its jurisdiction unless the State in whose territory the crime was committed has demonstrated that it was unwilling to carry out the investigation or prosecution, or was unable to do so.

Cuba

(a) The application of universal jurisdiction should serve as an extension of the domestic jurisdiction of each State. A declaration by a particular State that its domestic courts assumed responsibility for trying and judging the perpetrator should prevent any application of universal jurisdiction;

(b) The possibility should be considered that, when a State wishes to claim the application of universal jurisdiction, it should first obtain the consent of the State in which the violation took place and of the State of nationality;

(c) What crimes serve as the basis for applying universal jurisdiction should be specified, together with facts justifying its application. Such crimes should be restricted to crimes against humanity, and the application of universal jurisdiction should be invoked only under exceptional circumstances and when it has been recognized that no other means to bring criminal action against the perpetrators exist.

Kuwait

(a) The international community should take into consideration the need to conduct an exhaustive investigation, taking into account the practice, into mechanisms for applying universal jurisdiction in the light of international realities, starting possibly with studying and understanding the scope and nature, as well as the circumstances under which it will be applied, and the extent to which application was possible in the absence of such mechanisms;

(b) Universal jurisdiction should, as a general principle, be attached to the Rome Statute, and not applied to any crime other than the crimes covered by that Statute or to crimes covered by particular instruments;

(c) The international community, through the United Nations, should firmly establish universal jurisdiction through an international convention or instrument in

that regard, with a view to universally systematizing the rules, measures, procedures and means of implementation relating thereto.

Peru

(a) The fact that the various bases for establishing jurisdiction existed side by side could lead to disputes between States wishing to bring an accused before their courts. Accordingly, consideration should be given to setting an order of preference for the criteria for the attribution of jurisdiction based on the most appropriate venue;

(b) To avoid making generalizations as to the application of universal jurisdiction, the relevant individual crimes should be studied, to assess how each was dealt with in international law (custom and treaty);

(c) For each crime so identified, there should be an examination of whether the exercise of universal jurisdiction was optional or compulsory, bearing in mind the source of law (custom or treaty).

Rwanda

(a) In order to avoid any misuse and misunderstanding, and to reach the goal of effective exercise of universal jurisdiction, there should be, at the sixty-fifth session of the General Assembly, an attempt to define universal jurisdiction in terms of crimes falling under its application. This should be done by defining the crimes with a clear set of penalties in accordance with procedure to be followed by domestic law;

(b) In order to avoid politically motivated prosecutions (i) forum States should only take cases where justice, as opposed to political leverage, was determined to be the sole reason for the process; (ii) there should be special scrutiny of claims perceived to be "taking sides" in connection with an ongoing conflict, primarily of a political nature; (iii) although no precise guideline was possible, some consideration should be given to the cost of trials to public order outweighing their benefits to combating impunity;

(c) The 2001 Princeton Principles on Universal Jurisdiction should be incorporated: (i) crimes subject to universal jurisdiction include piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture (Principle 2); (ii) the application of universal jurisdiction to the crimes listed above was without prejudice to its application to other crimes under international law (Principle 2); (iii) once out of office, Government officials, including heads of State, should not be immune from prosecution based on the defence that they were acting in an official capacity (Principle 5); there should be no statute of limitations on the prosecution of these crimes (Principle 6); blanket amnesties generally were inconsistent with a nation's obligation to hold individuals accountable for these crimes (Principle 7);

(d) The other aspects of the Princeton Principles should also be incorporated: (i) a State shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law (Principle 1); (ii) in exercising it, a State and its judicial organs shall observe international due process norms, including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary (Principle 1);

(iii) in its exercise, a State or its judicial organs shall ensure that a person who is subject to criminal proceedings shall not be exposed to multiple prosecutions or punishment for the same criminal conduct (Principle 9); (iv) a State shall refuse to entertain a request for extradition based on universal jurisdiction if the person sought is likely to face a death penalty sentence or to be subjected to torture or any other cruel, degrading, or inhuman punishment or treatment, or if it is likely that the person sought will be subjected to sham proceedings in which international due process norms will be violated (Principle 10);

(e) There must be a system of review whereby an aggrieved person can appeal to another judge or another tribunal to review the decision of a judge issuing an international arrest warrant. The review process could be before a court of national, regional or international jurisdiction;

(f) In all circumstances, the opinion of the International Criminal Police Organization (INTERPOL) should be sought on whether an international arrest warrant should be issued on the basis of evidence available and where INTERPOL itself had not issued or advised that an international arrest warrant should be issued, no State should otherwise feel obliged to respect an arrest warrant issued by individual judges in individual States Member of the United Nations.

Table 1
List of crimes mentioned in the comments by Governments, concerning which universal jurisdiction (including other bases of jurisdiction) is established by the codes

Crime[a]		*State*
Piracy		Belarus, Cameroon, Cyprus, Netherlands
Slavery and associated offences		Australia, Austria, Cameroon, Iraq
Fiscal offences:	Forgery and alteration of money, sale or uttering counterfeited and altered currency and securities	Azerbaijan, Cameroon, Cyprus, Czech Republic, Finland, Italy, Portugal, Germany, Tunisia
	Manufacturing and possession of forgery tools, weights and equivalent objects	Czech Republic, Portugal
	Unauthorized production of money	Czech Republic
	Credit certificate and sealed value	Portugal
Genocide		Armenia, Australia, Belarus, Belgium, Bulgaria, Costa Rica, Czech Republic, Estonia, Finland, Malta, Norway
Crimes against humanity		Australia, Azerbaijan, Belarus, Belgium, Bulgaria, Costa Rica, Estonia, Finland, Malta, Norway

Crime[a]	*State*
Attacks on humanity	Czech Republic
Crimes against the security of humankind	Belarus
Crimes against peace	Azerbaijan, Belarus, Bulgaria
Aggression	Estonia
Propaganda for war	
Preparation of aggressive war	Czech Republic
War crimes:	Australia, Azerbaijan, Belarus, Belgium, Bulgaria, Czech Republic, Costa Rica, Estonia, Finland, Malta, Norway, Sweden, Switzerland
Using prohibited means of combat and unlawful warfare, war cruelty, persecution of a population, plundering in the war area	Czech Republic
Production, stockpiling or distribution of prohibited instruments of war	Belarus
Manufacture and distribution of prohibited weapons	Estonia
Violation of the laws and customs of war	Belarus, Bulgaria, Costa Rica, Norway
Inaction or issuance of a criminal order in time of armed conflict	Belarus
Application of prohibited methods of war	Armenia
Application of prohibited methods of war	
Torture	Australia, Azerbaijan, Czech Republic, Finland, France
Other inhuman and cruel treatment	Czech Republic
Apartheid and discrimination against a group of people	Bulgaria, Czech Republic
Violation of measures necessary for application of international sanction	Estonia
Ecocide	Armenia, Belarus
Production, proliferation or use of weapons of mass destruction	
Offences involving nuclear energy, explosives or radiation or endangerment	Germany, Finland

Crime[a]		*State*
Offences related to chemical weapons		Finland
Offences related to biological weapons		
Use of mines		
Offences against international security or State security		Estonia, Tunisia
	Sabotage or disruption of international means of communication and transportation	Czech Republic, Iraq
	Espionage	Czech Republic
	Treason	Cyprus
Terrorism-related offences:		Austria, Azerbaijan, Belgium, Cameroon, Finland, France, Malaysia
	Terrorist attacks/bombings	Czech Republic, Finland, France
	Terror	Czech Republic
	Financing of terrorism	Azerbaijan, Finland, France
	Hijacking of aircraft	
	Maritime piracy	Azerbaijan, Finland, France, Tunisia
	Air piracy	Austria, Finland, France, Tunisia
	Hostage-taking	Azerbaijan, Finland
	Offences/attacks against air or sea traffic	Germany
	Terrorism-related attacks on internationally protected persons or organizations	Azerbaijan, Finland
	Violence at airports, fixed platforms	Finland, France
	Crimes involving radioactive materials	Azerbaijan
	Nuclear terrorism	Finland, France
Attacks against air or sea traffic		Germany

Crime[a]		*State*
Offences related to United Nations and associated personnel		Finland
Fiscal interests and acts of corruption		Belgium, France
Organized crime		Austria
Money-laundering		Cameroon
Participation of illegal associations		Ethiopia
Offences against the personality of the State, State symbols or State representative:		Italy
	Misuse of internationally acknowledged symbols and signs and State coat of arms	Czech Republic
	Forgery of the State seal	Cameroon, Tunisia
	Misuse of a flag and ceasefire	Czech Republic
	Assaulting a parliamentary official	Czech Republic, Norway
	Crimes against "national independency and integrity"	Portugal
Narcotic drugs and psychotropic substances and drug-related crimes		Austria, Azerbaijan, Cameroon, Cyprus, Ethiopia, Finland, Germany, Iraq
Offences against morality of exploitation:	Human trafficking	Austria, Azerbaijan Belarus, Belgium, Finland, Germany
	Trafficking in women and minors	Belgium, Ethiopia, Iraq
	Forced or child marriage	Norway
	Extortive abduction	Austria
	Non-respect for certain rules applicable to the activities of marriage bureaux	Belgium
	Genital mutilation/sexual mutilation of females	Belgium, Norway
	Obscene or indecent publications	Ethiopia, Germany
	Obscene or indecent performances	Ethiopia

Crime[a]	*State*
Offences concerning computer and communications fraud	Portugal
Subsidy fraud	Germany
Offences against the course of the rule of law	Portugal
Electoral crimes	
Offences relating to toxic wastes	Cameroon, Portugal
Enforced disappearance	France (legislation on jurisdiction pending)
Certain road offences	France

[a] This includes crimes in relation to international agreements which give rise to proceedings before some jurisdictions under the codes (e.g., France), as well as crimes concerning which the application of the Criminal Code has been extended by Decree (e.g., Finland).

Table 2
Specific legislation relevant to the subject, based on information submitted by Governments

Category	*Legislation*	*Country*
Piracy	Crimes Act	Australia
	Courts of Judicature Act	Malaysia[a]
	Courts Act (for offences committed on the high seas)	Mauritius
	Crimes Act	New Zealand
	18 U.S.C. § 1651	United States
Fiscal and monetary offences	Act on Prevention of Procuring Money for the Purpose of Threatening the Public	Republic of Korea
Genocide	Crime of Genocide (prevention and punishment) Law	Israel
	Code of Crimes against International Law	Germany
	International Crimes Act 2003	Netherlands
	Law 31/2004	Portugal
	18 U.S.C. § 1091	United States

Category	*Legislation*	*Country*
Torture	Law No. 498	Italy
	International Crimes Act	Netherlands
	18 U.S.C. § 2340A (Torture)	United States
Crimes against humanity	Code of Crimes against International Law	Germany
	International Crimes Act	Netherlands
	Law 31/2004	Portugal
War crimes	Nazi and Nazi Collaborators (Punishment) Law	Israel
	Code of Crimes against International Law	Germany
	International Crimes Act	Netherlands
	Geneva Conventions Act	New Zealand
	Law 31/2004	Portugal
Apartheid	Act No. 2116	Plurinational State of Bolivia
Terrorism-related offences	Crimes (Ships and Fixed Platforms) Act	Australia
	Law No. 107	Italy
	Law No. 342	Italy
	Prevention of Terrorism Act	Mauritius
	Law 52/2003	Portugal
	Act on Punishment for Damaging Ships and Sea Structures	Republic of Korea
	Civil Aviation Offences Act	South Africa
	Nuclear Energy Act	
	Protection of Constitutional Democracy Against Terrorist and Related Activities Act	
	Law No. 75/2003, as revised and supplemented by Law No. 65/2009	Tunisia

Category	*Legislation*	*Country*
	18 U.S.C. § 32 (Destruction of aircraft or aircraft facilities); 18 U.S.C. § 37 (Violence at international airports)	United States[b]
	18 U.S.C. § 112, 878, 1116 (Protection of foreign officials, official guests, and internationally protected persons)	
	18 U.S.C. § 831 (Prohibited transactions involving nuclear materials)	
	18 U.S.C. § 1203 (Hostage-taking)	
	18 U.S.C. § 2280 (Violence against maritime navigation)	
	18 U.S.C. § 2281 (Violence against maritime fixed platforms)	
	18 U.S.C. § 2332f (Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities)	
	49 U.S.C. § 46502 (Aircraft piracy)	
Offences concerning mercenaries	Mercenary Activities (Prohibition) Act	New Zealand
	Law 31/2004	Portugal
	Regulation of Foreign Military Assistance Act	South Africa
Implementation of the International Criminal Court and other tribunals	International Crimes Act	Kenya
	Act No. 95-1/1995 (International Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda	France
	Code of Crimes against International Law	Germany
	International Crimes and International Criminal Court Act	New Zealand
	Crimes Act	

Category	*Legislation*	*Country*
	Act on Punishment, etc., of Crimes under Jurisdiction of the International Criminal Court	Republic of Korea
	Implementation of the Rome Statute of the International Criminal Court Act	South Africa
	Draft law on implementation of the Rome Statute of the International Criminal Court, No. 920/2008	Plurinational State of Bolivia
	Pending bill to implement the Rome Statute	Mauritius
	Pending Act on International Crimes and an amendment to the Penal Code	Sweden
Shipping offences	Merchant Shipping Act	Mauritius
	Act on Punishment for Damaging Ships and Sea Structures	Republic of Korea
Crimes relating to drugs and narcotic and psychotropic substances	Act on Special Cases concerning the Prevention of Illegal Trafficking in Narcotics	Republic of Korea
	Dangerous Drugs Act	Mauritius
Money-laundering	Law No. 75/2003, as revised and supplemented by Law No. 65/2009	Tunisia

[a] Malaysia noted that in respect of offences concerning trafficking in persons, computer crimes, money-laundering, the extraterritorial jurisdiction of the Courts was provided for under the respective laws.

[b] The United States noted that broad criminal jurisdiction for some of these (terrorism-related) crimes may also reflect customary international law based on relevant State practice and *opinio juris*.

Table 3
Relevant treaties which were referred to by Governments, including treaties containing *aut dedere aut judicare* provisions

I. Universal instruments[a]

Piracy	Convention on the High Seas, 1958	New Zealand, Tunisia
	United Nations Convention on the Law of the Sea, 1982	Chile, China, New Zealand, Tunisia
International humanitarian law	Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 1929, and the Geneva Convention relative to the Treatment of Prisoners of War, 1929	Plurinational State of Bolivia
	Geneva Conventions of 1949	Armenia, Plurinational State of Bolivia, Cameroon, Chile, China, Republic of Korea, New Zealand, Malta, Slovenia, Tunisia
	Additional Protocols of 1977	
	Protocol I	Armenia, Cameroon, Chile, China, Czech Republic, Republic of Korea, New Zealand, Slovenia, Tunisia
	Protocol II	Armenia, Cameroon, Czech Republic, New Zealand, Tunisia
	Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, and the First Protocol of 1954	China
	Second Protocol of 1999 to the Convention for the Protection of Cultural Property in the Event of Armed Conflict	Slovenia
Genocide	Convention on the Prevention and Punishment of the Crime of Genocide, 1948	Armenia, Czech Republic, Malta, South Africa
International criminal law	Rome Statute of the International Criminal Court, 1998	Bulgaria, Plurinational State of Bolivia, Mauritius, New Zealand, South Africa, Sweden

Torture	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984	Armenia, Plurinational State of Bolivia, Bulgaria, Cameroon, China, Czech Republic, Republic of Korea, Malta, Slovenia, South Africa, Tunisia
Apartheid	International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973	Armenia, Plurinational State of Bolivia, China
Acts of terrorism	Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963	Armenia, Bulgaria, South Africa
	Convention for the Suppression of Unlawful Seizure of Aircraft, 1970	Armenia, Bulgaria, China, Republic of Korea, Slovenia, South Africa, United States
	Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971	Armenia, China, Republic of Korea, Slovenia, South Africa, United States
	Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 1988	Armenia, China
	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988	Armenia, China, Republic of Korea, Slovenia, South Africa, United States
	Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988	
	Convention on the Physical Protection of Nuclear Material, 1980	Armenia, China, Republic of Korea, Slovenia
	Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991	Armenia
	Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973	Armenia, China, Republic of Korea, Slovenia, South Africa, United States
	International Convention against the Taking of Hostages, 1979	Armenia, Bulgaria, China, Republic of Korea, Slovenia, South Africa, United States

	International Convention for the Suppression of Terrorist Bombings, 1997	
	International Convention for the Suppression of the Financing of Terrorism, 1999	
	International Convention for the Suppression of Acts of Nuclear Terrorism, 2005	Armenia, China, Slovenia, South Africa
Narcotic drugs and psychotropic substances	Single Convention on Narcotic Drugs, 1961	Republic of Korea
	Protocol of 1972 amending the Single Convention on Narcotic Drugs	China, Republic of Korea
	Convention on Psychotropic Substances, 1971	
	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988	
Corruption and transnational organized crime	United Nations Convention against Transnational Organized Crime, 2000	China, Slovenia
	United Nations Convention against Corruption, 2003	China, Republic of Korea
	Optional Protocol of 2000 to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	China
Safety of United Nations and associated personnel	Convention on the Safety of the United Nations and Associated Personnel, 1994	China, Republic of Korea, Slovenia, Tunisia
Enforced disappearances	International Convention for the Protection of All Persons from Enforced Disappearance, 2006	Armenia, Tunisia
Non-applicability of the statute of limitations	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968	Armenia, Plurinational State of Bolivia

[a] In some situations a general comment was made that the States concerned were party to multilateral international treaties to combat such crimes as terrorism, illicit traffic in narcotic drugs and psychotropic substances, genocide, destruction of a population, apartheid, slavery, war crimes, hijacking of an aircraft, hostage-taking, crimes against internationally protected persons, piracy, smuggling, counterfeiting of currency or securities or sale of counterfeit currency or securities, environmental pollution, etc. (eg., Azerbaijan).

II. Regional instruments

Terrorism and money-laundering	Organization of African Unity Convention on the Prevention and Combating of Terrorism, 1999	South Africa
	European Convention on the Suppression of Terrorism, 1977, and the Protocol of 2003 amending the Convention	Armenia
	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005	
Enforced disappearances	Inter-American Convention on Forced Disappearance of Persons, 1994	Plurinational State of Bolivia
Extradition and mutual assistance	European Convention on the Transfer of Proceedings in Criminal Matters, 1972	Armenia
	European Convention on Extradition, 1957	Armenia, Czech Republic, South Africa
	Two Additional Protocols of 1975 and 1978 to the European Convention on Extradition	Armenia
	Convention on the Transfer of Sentenced Persons, 1983	
	European Convention on Mutual Assistance in Criminal Matters, 1959, and the Additional Protocol of 1978	
	Commonwealth of Independent States (CIS) Convention on Extradition of Persons Sentenced to Imprisonment for Serving Further Sentence	
	CIS Convention on Extradition of Offenders with Mental Disorders to another State for Compulsory Treatment	
	CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, 1993	Armenia, Belarus

III. Bilateral instruments

Extradition and mutual assistance in criminal matters	Also mentioned were bilateral agreements on extradition, and on legal assistance in criminal matters	Armenia, Czech Republic, South Africa

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Diplomatic protection

Diplomatic protection

Comments and information received from Governments

Report of the Secretary-General

I. Introduction

1. The International Law Commission adopted the draft articles on diplomatic protection at its fifty-eighth session, in 2006.[1] In its resolution 61/35, the General Assembly took note of the draft articles as adopted by the Commission and invited Governments to submit comments concerning the Commission's recommendation that the Assembly elaborate a convention on the basis of the articles.[2] By its resolution 62/67, the Assembly welcomed the conclusion of the work of the International Law Commission on diplomatic protection and its adoption of the draft articles and commentary[3] on the topic. The Assembly commended the articles on diplomatic protection presented by the Commission, the text of which was annexed to the resolution, to the attention of Governments and invited them to submit any further comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles in writing to the Secretary-General. The Assembly decided to further examine, at its sixty-fifth session in 2010, within the framework of a working group of the Sixth Committee, in the light of the written comments of Governments, as well as views expressed in the debates held at the sixty-second session of the Assembly, the question of a convention on diplomatic protection or any other appropriate action on the basis of the above-mentioned articles.

2. By a note verbale dated 7 July 2008, the Secretary-General invited Governments to submit, no later than 1 June 2010, their written comments concerning the recommendation by the Commission to elaborate a convention on the basis of the

* A/65/150.
[1] See A/61/10, para. 49.
[2] See A/62/118 and Add.1.
[3] See A/61/10, para. 50.

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articles on diplomatic protection. That request was reiterated in a note verbale dated 21 August 2009.

3. As at 20 July 2010, the Secretary-General had received written comments from Austria, the Czech Republic, Estonia, France, Kuwait, Malaysia, Paraguay, Portugal, Saudi Arabia, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Those comments are reproduced below, organized according to comments on any future action regarding the articles on diplomatic protection (section II) and on the articles on diplomatic protection themselves (section III).

II. Comments on any future action regarding the articles on diplomatic protection

Austria

[Original: English]
[21 May 2010]

With regard to the proposal to elaborate a convention on diplomatic protection, Austria is not convinced of the usefulness of starting this project immediately. The text adopted on second reading was elaborated in a very short time and it is necessary for States to have some time for reflection on the result. Austria would therefore prefer to wait and place the item on the agenda again after a few years, in order to assess the possibility for taking the necessary steps towards the elaboration of a convention either by convening an ad hoc committee, a preparatory committee or a codification conference. This would give States the opportunity to consider further the contents of the articles.

Czech Republic

[Original: English]
[26 May 2010]

The Czech Republic's written comments on the topic of diplomatic protection were presented to the Secretary-General in 2007.[4] Since that date, there have been no major developments requiring a change of position.

Estonia

[Original: English]
[7 July 2010]

The articles on diplomatic protection are a valuable point of reference for States in matters relating to the exercise of diplomatic protection. They constitute a comprehensive codification of principles of international law followed by States and are therefore highly useful in their current form without the need for further elaboration into a convention.

[4] See A/62/118.

France

[Original: French]
[20 May 2010]

The articles have not managed to address all the difficulties raised by the issue of diplomatic protection in international law. The importance of the doctrine of diplomatic protection and the approaches taken by the Commission amply suggest that States should consider such a topic during an international conference with the aim of adopting an international convention that would harmonize practice with respect to diplomatic protection.

Malaysia

[Original: English]
[29 June 2010]

Diplomatic protection belongs to the subject of "treatment of aliens" but does not deal with the primary rules, which dictate the treatment of the person and property of aliens, a breach of which gives rise to the responsibility of a State towards the injured person. The articles on diplomatic protection are instead confined only to secondary rules that relate mainly to the conditions that must be met to bring a claim for diplomatic protection. By and large, this means the rules governing the admissibility of claims. As is evident from the commentaries to the articles, there exists a well-established corpus of State practice and *opinio juris* on the subject matter. In this regard, it should be noted that the wealth of judicial[5] and arbitral decisions[6] in the field of diplomatic protection represents quite clearly evidence of custom which is binding on States. The codification of the articles will indeed provide clarity of those rules and serve as a guide for the application of diplomatic protection by States vis-à-vis the espousal of claims by their nationals who have been injured by the internationally wrongful acts of other States. Malaysia notes that the articles also represent a progressive development of international law especially as envisaged in articles 8 (Stateless persons and refugees) and 19 (Recommended practice).

The drafting of the articles on diplomatic protection originally belonged to the study of responsibility of States for internationally wrongful acts. In his seventh report,[7] the Special Rapporteur, Mr. John Dugard, observed that the fate of the draft articles on diplomatic protection was closely bound up with that of the draft articles on the responsibility of States for internationally wrongful acts, of 2001.[8] Malaysia

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[5] See *Mavrommatis Palestine Concessions Case (Jurisdiction) (Greece v. United Kingdom), P.C.I.J. Reports, 1924*, Series A, No. 2; *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania), P.C.I.J. Reports*, Series A/B, No. 76; *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain), Second Phase, Judgement, I.C.J. Reports, 1970*; *Reparations for injuries suffered in the service of the United Nations, I.C.J. Reports, 1949*, Advisory Opinion of 11 July 1949.

[6] See *Harry Roberts (U.S.A.) v. United Mexican States (United States v. Mexico, 1926) R.I.A.A.* IV; *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (United States v. Mexico, 1926) R.I.A.A.* IV.

[7] See A/CN.4/567, para. 6.

[8] See General Assembly resolution 56/83 of 12 December 2001.

concurs in this observation and considers that so long as no decision is taken about the elaboration of a convention on the responsibility of States for internationally wrongful acts, any decision to do so for the articles on diplomatic protection would be premature.

Finally, Malaysia notes that, in the past, support has been expressed with regard to the elaboration of an international convention. Malaysia reiterates its commitment to ensuring its nationals are humanely treated abroad and upholds its entitlement to guard its nationals from injuries suffered from the internationally wrongful acts of other States. Malaysia nonetheless believes that the exercise of diplomatic protection should remain within the sovereign prerogative and integral discretion of a State. Taking into account its own concerns and the divergent views of Member States, Malaysia considers it unnecessary at this stage to elaborate a convention as it would risk undermining the important work that has been undertaken by the International Law Commission, particularly if a significant number of States do not ratify the resulting convention.

Portugal

[Original: English]
[1 June 2010]

The completion by the International Law Commission of 19 draft articles on diplomatic protection in less than 10 years since the topic was first identified as suitable for codification and progressive development proves that the topic was indeed ripe and adequate for that purpose and that it is a useful institution in contemporary international relations. Portugal has already welcomed the recommendation by the Commission for the elaboration of a convention on the basis of the articles.

Portugal is in agreement with the articles in general and with their suitability for an international convention, regardless of the fact that during the debates of the Sixth Committee, where the topic was discussed, Portugal voiced some disagreement with regard to certain aspects, in particular concerning both the scope of the articles and their content.

United Kingdom of Great Britain and Northern Ireland

[Original: English]
[15 June 2010]

The United Kingdom has previously expressed the view, in concurrence with that of the Special Rapporteur, that the fate of the articles on diplomatic protection is closely bound up with that of the draft articles on the responsibility of States for internationally wrongful acts. Article 1 of the articles on diplomatic protection defines diplomatic protection in terms of the invocation of the responsibility of another State, and the provisions of the articles can be seen as giving content to the admissibility requirements of article 44 of the articles on the responsibility of States for internationally wrongful acts in the specific context of diplomatic protection.

Consequently the United Kingdom considers that, in the absence of consensus on the elaboration of a convention on the basis of the responsibility of States for

internationally wrongful acts, it would be premature to commence negotiations on a convention based on the articles on diplomatic protection. In its note of 10 March 2010, providing comments on the articles on responsibility of States for internationally wrongful acts,[9] the United Kingdom confirmed its view that embarking on the process of negotiating a convention on the basis of those articles would be neither necessary nor desirable.

Moreover, the United Kingdom notes that the articles on diplomatic protection adopted on second reading contain elements that would amount to progressive development of customary international law, and not simply its codification. Under the circumstances, the United Kingdom would be concerned that a move at this stage to elaborate a convention might risk opening up a debate on the articles, which may undermine the important consolidating work and commentary that has already been undertaken. It also notes that some of the progressive development of the law continues to raise concerns for the United Kingdom, and conflicts with its current practice. It is particularly concerned that the non-binding article 19, entitled "Recommended practice", risks undermining the absolute discretion of a State to decide whether or not to exercise diplomatic protection, and is thus not suitable for inclusion in a convention.

The United Kingdom considers that the articles on diplomatic protection have a valuable role in the clarification and development of customary international law on diplomatic protection. As it has emphasized with respect to both the articles on diplomatic protection and the articles on the responsibility of States for internationally wrongful acts, the elaboration of articles into a convention should not be seen as the only possible successful conclusion to this body of work. The most appropriate final form of the articles is that which best serves the clarification and development of the law, and at present, and in the absence of a convention on responsibility of States for internationally wrongful acts, the United Kingdom considers that that would be best achieved by allowing the articles to inform and influence State practice without moving to negotiate a convention.

United States of America

[Original: English]
[27 May 2010]

During the sixty-second session of the General Assembly in 2007, the United States, along with other countries, expressed concern that a limited number of articles deviate from well-settled customary international law. Nevertheless, to the extent that the articles reflect the large body of State practice in this area, they represent a major contribution to the law of diplomatic protection, and are thus valuable to States in their present form. It is feared that the process of negotiating a convention risks undermining the substantial contributions of the articles. The United States therefore believes that the General Assembly should take no further action on the articles at this time.

[9] See A/65/96.

III. Comments on the articles on diplomatic protection

Kuwait

[Original: Arabic]
[11 August 2008 and 1 June 2010]

The articles on diplomatic protection comprehensively address the various aspects of such protection. However, they are entirely predicated on the occurrence of an internationally wrongful act. This is not a sufficient basis for invoking or exercising diplomatic protection inasmuch as it is now recognized that, according to the theory of risk, international responsibility arises not only from the wrongful act of a State, but also as a result of injuries caused by the lawful acts of a State.

On the basis of this additional criterion, the State is internationally liable for certain actions that are permissible under international law, as is the case with lawful activities undertaken by States in connection with outer space or the environment. In such cases, the State performing the act is obliged to compensate for the injury caused to other States or to their nationals merely because the injury occurred, regardless of whether the State's action was unlawful. It is thus necessary, in article 1, to delete the word "wrongful" from the description of the act that gives rise to diplomatic protection. Otherwise, the article should stand as is.

The proposal of the Government of Kuwait expands the scope of diplomatic protection to include all acts performed by other States, whether lawful or not, and is something desirable in relation to a State's ability to protect its nationals at the international level.

The formulation of articles 3 and 4 is acceptable and consistent with the principles of international law and other relevant trends.

Malaysia

[Original: English]
[29 June 2010]

Under international law, a State is responsible for an injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured person to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. Malaysia concurs with the position, in international law, that a State has no duty or obligation to exercise diplomatic protection. In the *Barcelona Traction* case, it was held that "the State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease".[10] Malaysia nonetheless notes that there is support in domestic legislation for the view that there is some obligation on States to exercise diplomatic protection to protect their nationals

[10] *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain), Second Phase, Judgments, I.C.J. Reports 1970.*

abroad when they have been subjected to serious violations of their human rights.[11] In that regard, article 19, subparagraph (a) of the draft articles on diplomatic protection, recommends to States that due consideration should be given to the possibility of exercising diplomatic protection on behalf of a national who suffers a significant injury. Malaysia further notes with concern that paragraph 3 of the commentary to the article highlights the decision of the South African Constitutional Court in the case of *Kaunda and Others v. President of the Republic of South Africa and Others*.[12]

Article 8 is a progressive development of the law which departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection and allows a State to exercise diplomatic protection in respect of a non-national where that person is either a stateless person or a refugee. Malaysia is not a party to any treaty relating to stateless persons and refugees and therefore is not bound to recognize the status of such persons.

Malaysia notes that part two, chapter III, generally represents a codification of customary international law as set forth in the *Barcelona Traction* case. However, the entitlement under article 11, subparagraph (a), allowing the State of nationality of the shareholder to exercise diplomatic protection if "The corporation has ceased to exist according to the law of the State ..." would create a broad spectrum of claims to protection by the State of nationality of the shareholders. The articles should draw a distinction between the rights of the corporation, which are to be protected, and the interests of shareholders, which are not. The International Court of Justice, in *Barcelona Traction*, rightly pointed out that permitting a State of nationality of the shareholders the right to protection would create "an atmosphere of confusion and insecurity in international economic relations".[10]

Malaysia notes that part three of the articles is a codification of the customary international law requirement of the exhaustion of local remedies. Malaysia, however, considers that the adoption of the word "manifestly", in article 15, subparagraph (d), is too broad and ambiguous, and a more comprehensive study should be undertaken in order to provide States with clear guidance with regard to that rule.

[11] For example, article 36 of the Constitution of Poland of 1997 declares that a Polish national abroad has a right to protection by the Republic of Poland. Similar provisions can also be found in the constitutions of Albania, Belarus, Bosnia and Herzegovina, Croatia, Hungary, Lithuania, Latvia and Romania.

[12] 2005 (4) *South African Law Reports*, ILM vol. 44, p. 235 (2005) ("[t]here may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and a court would order the government to take appropriate action").

Paraguay

[Original: Spanish]
[28 May 2010]

With regard to the articles on diplomatic protection, Paraguay has no objections from the perspective of international law.

Saudi Arabia

[Original: English]
[21 May 2010]

There is a need to simplify and clarify some of the articles, especially the exceptions regarding the requirement of the exhaustion of local remedies, and to provide examples of "other means of peaceful settlement" referred to in article 1. A new paragraph should be added to article 5, as follows:

> "No State should claim diplomatic protection for a person who gains its citizenship after the injury."

The exception would be for individuals who were stateless when the injury was suffered and were legally residing in the State where citizenship was subsequently granted. Article 8 may grant the refugee (with dual citizenship) more rights than other dual citizens (under article 6). In article 15, subparagraph (a), the phrase "reasonably available local remedies" is not precise. It may be said that the jurors system and plea bargaining a confession, which is used in many States, do not reasonably constitute local remedies.

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Item 144 of the provisional agenda*
Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Revised estimates relating to the budget of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 for the biennium 2010-2011

Report of the Secretary-General

Summary

The present report reflects additional resource requirements in the amount of $42,549,600, net of staff assessment, over the initial appropriation for the biennium 2010-2011, as approved by the General Assembly in its resolution 64/240 for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. The increased requirements are due to the revision of the trial schedule for the biennium to reflect changes in the completion dates of a number of first-instance trials. The Assembly is requested to approve an additional appropriation in the amount of $47,603,800 gross ($42,549,600 net) to the Special Account for the International Tribunal for the Former Yugoslavia for the biennium 2010-2011.

* A/65/150.

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I. Introduction

1. The General Assembly, in its resolution 64/240, decided to appropriate to the Special Account for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 a total amount of $290,285,500 gross ($267,987,800 net) for the biennium 2010-2011.

2. In paragraph 5 of his report to the General Assembly on the budget for the Tribunal for the biennium 2010-2011 (A/64/476), the Secretary-General indicated that a number of external factors beyond the Tribunal's control could and would have a major impact on the anticipated completion dates of trials. He also indicated that should the trial schedule vary significantly from that used for the formulation of the 2010-2011 budget proposal, the requirements would have to be reassessed and estimates related to the changes in the trial schedule would be addressed in the context of revised estimates.

3. Since the budget for the Tribunal for the biennium 2010-2011 was approved, for reasons beyond the Tribunal's control, the trial schedule has been revised to reflect changes in the completion dates of a number of first-instance trials as compared with the schedule available at the time of the preparation of the budget.

II. Revised programme of work for 2010-2011

4. The approved budget for the Tribunal was prepared with reference to the trial schedule applicable at the time of the preparation of the budget for the biennium 2010-2011. That trial schedule had contemplated the undertaking of six to eight concurrent trials during the first nine months of 2010 and the reduction of trial activity as from the third quarter of 2010, with five trials running by October 2010, four trials by November 2010, three trials in January 2011 and only one extending into 2012. During the biennium 2010-2011, the Tribunal was expected to hear 8 first-instance trials, involving 15 accused, and to complete 7 cases, involving 14 accused, as set out below:

(a) Cases in which judgement will be completed: 7 cases involving 14 accused (*Šešelj* (1 accused); *Stanišić and Simatović* (2 accused); *Perišić* (1 accused); *M. Stanišić and Župljanin* (2 accused); *Tolimir* (1 accused); *Đorđević* (1 accused); and *Prlić et al.* (6 accused));

(b) Cases in which trials will be ongoing: 1 case involving 1 accused (*Karadžić*).

5. However, the estimates of the time frame for the completion of the ongoing trials have been revised in the light of progress made since the submission of the initial budget proposals for the biennium 2010-2011. It should be noted that the anticipated commencement and completion dates of trials are based on current estimates, which are subject to change owing to factors beyond the control of the Tribunal, such as the health of the accused, the number of interlocutory appeals submitted during the proceedings, requests for the replacement of defence counsel and self-representation, the unforeseen disclosure of materials such as the 18 military notebooks of Ratko Mladić and other motions affecting the proceedings, such as the availability of witnesses to certify statements and provide testimony.

6. Owing to the lengthening of the time frame for completion, two first-instance cases (*Popović et al.* and *Gotovina et al.*) originally scheduled for completion in 2009 are now due for completion in 2010 (the judgement in *Popović et al.* was in fact rendered on 10 June). At the same time, four first-instance cases (*Šešelj*, *Perišić*, *M. Stanišić and Župljanin* and *Tolimir*) originally scheduled for completion in 2010, now extend through 2011 and into 2012. Furthermore, one case due to be completed in early 2011 (*Stanišić and Simatović*) has now been extended into 2012.

7. During the biennium, the Tribunal will be conducting trials and writing judgements in 10 cases involving 25 accused persons, as set out below:

(a) Cases in which judgement will be completed: 5 cases involving 18 accused (*Perišić* (1 accused); *Đorđević* (1 accused); *Prlić et al.* (6 accused); *Gotovina et al.* (3 accused); and *Popović et al.* (7 accused));

(b) Cases in which trials will be ongoing: 5 cases involving 7 accused (*Šešelj* (1 accused); *M. Stanišić and Župljanin* (2 accused); *Karadžić* (1 accused); *Stanišić and Simatović* (2 accused); and *Tolimir* (1 accused)).

8. In summary, the changes in the trial schedule since the time of the preparation of the budget for the biennium 2010-2011 have had a significant impact on the trial workload for the biennium. While significant progress in trial proceedings has been made in recent years, factors over which the Tribunal has no control continue to have an impact on the estimated completion dates of trials. The Tribunal is doing its utmost to expedite the proceedings while at the same time ensuring the rights of the accused to due process.

9. The budget of the Tribunal is mainly trial-driven. The greater the number of trials running at the same time, the greater the number of staff in the Chambers, the Office of the Prosecutor and the Registry required to support the proceedings. In the schedule used for the preparation of the budget for the biennium 2010-2011, the Tribunal anticipated a decrease in trial activity as from the third quarter of 2010 following the completion of first-instance trials. It was anticipated that, as at the end of September 2010, the Tribunal would be running five trials concurrently, of which one was due to be completed by the end of October, one was due to be completed by the end of December and two were due to be completed by the end of February 2011, with one remaining trial extending into 2012. However, under the latest schedule, eight trials will be running at the same time until the end of December 2010, with seven of them continuing until the end of April 2011, six until the end of September and five until December. On the basis of the revised trial schedule, the Tribunal anticipates that there will not be a decrease in trial activity in 2010 as originally planned, with the pace remaining unaltered at 2009 levels, and that the pace of trial activity will be reduced only slightly as from October 2011, when the number of concurrent trials will be reduced from six to five.

III. Status report on trials and referrals as at 30 June 2010

Popović et al.

10. It was forecast that the trial of *Popović et al.* would be completed in October 2009, but it was actually completed in June 2010, which reflects an eight-month delay owing to staff turnover and other judicial commitments of the judges. The presiding judge, Judge Agius, is a member of the Appeals Chamber and Chair of the

Rules Committee, and Judge Kwon is the Vice-President of the Tribunal and the presiding judge in the *Karadžić* case. Throughout the course of the trial there has been a lack of continuity in the legal support provided to the judges of the Chamber, due not only to departures of staff from the Tribunal, but also to the need for several of the staff to contribute to other cases. Of the six staff members currently working full-time on the case, only one has been with the case since the commencement of the trial in July 2006. In addition, three experienced members of the legal staff, who had worked on the trial for years, left shortly before the end of the evidentiary phase of the trial. During the judgement-drafting phase, promotion and illness have further reduced the continuity of the legal support.

Đorđević

11. It was forecast that the *Đorđević* trial would be completed in May 2010. However, the estimate has since been revised to September, a delay of four months. The defence case, which commenced on 30 November 2009, has been more extensive than anticipated, in part because of the use of evidence from domestic trials in the region, which concerned the same crimes. Deliberations in the trial will be lengthened because two of the three judges of the *Đorđević* bench are also sitting in other trials (Judge Flügge as presiding judge in *Tolimir* and Judge Baird in *Karadžić*).

Gotovina et al.

12. It was forecast that the *Gotovina et al.* trial would be completed in October 2009. The estimate has since been revised to December 2010, however, reflecting a 14-month delay. After the defence cases concluded at the end of January 2010, the Chamber decided to call seven witnesses. The evidence of those witnesses has become more complicated than expected, however, owing to developments in Croatia in December 2009, namely, a domestic criminal investigation that is interlinked with some of the witnesses the Chamber wishes to hear. As a direct consequence of that investigation, the prosecution filed a motion to reopen its case to hear another three witnesses. The Chamber granted the prosecution motion, and the defence requested certification to appeal the decision. The request was granted by the Trial Chamber in late April 2010 and is pending before the Appeals Chamber. The full consequences in terms of delay are therefore still unknown. Throughout the trial, there has been extensive litigation regarding unfulfilled prosecution requests for the production of documents by Croatia. Furthermore, in December 2009, another criminal investigation in Croatia led to arrests and searches of members of the Gotovina defence team, which created a series of challenges related to the fair and expeditious conduct of the proceedings. Finally, since the beginning of 2009, two of the judges and members of the legal support staff have been engaged in another case (*Stanišić and Simatović*), which has allowed both trials to move forward, but which has also resulted in resources being diverted from the *Gotovina et al.* trial. In addition, one staff member left the legal support staff and was replaced with a less-experienced person.

Perišić

13. It was forecast that the *Perišić* trial would be completed in September 2010, but the estimate has since been revised to April 2011, reflecting a seven-month delay. Although the prosecution called fewer witnesses than anticipated to give

evidence, in terms of calendar months the trial took longer than originally estimated because of scheduling problems and the late admission of a significant number of documents. There have also been late developments, with the prosecution discovering new evidence following fresh investigations undertaken by national authorities. This new evidence, which consists of a number of documents, has necessitated an adjournment of the proceedings to give time for the materials to be translated and to give the defence the opportunity to reassess its case. The team leader of the legal support staff left the Tribunal and had to be replaced internally during the autumn of 2009, which had an impact on the expeditious conduct of the proceedings.

Prlić et al.

14. It was forecast that the *Prlić et al.* trial would be completed in February 2011, but the estimate has since been revised to September 2011, reflecting a seven-month delay. Since the start of the trial, the Chamber has dealt with more than 489 written motions and to date has issued 654 written decisions. Some of the motions, including those for the admission of 735 adjudicated facts and more than 5,000 exhibits from the bar table, have been exceedingly complicated. Additionally, the Chamber has issued decisions on oral motions for the admission of evidence through 208 viva voce witnesses. The Trial Chamber has analysed 216 written statements for admission pursuant to rule 92 bis of the Tribunal's rules of procedure and evidence. To date, 9,575 exhibits have been admitted. Presiding Judge Antonetti is also serving as the presiding judge in the *Šešelj* trial, and Judge Mindua sits on the bench in *Tolimir*; scheduling is therefore a challenge for those three trials. Moreover, a high turnover of the staff has had an impact upon the work of the Chamber. Since the beginning of the trial, four different senior legal officers have been assigned to the case in succession, as well as five different legal officers. Currently, out of the eight-person legal support team, one member has less than six months' experience in the Tribunal, another just one year of experience and two others 18 months' experience. Taking into account the length and complexity of the case, it takes several months for each replacement to become familiar with the case. The constant staff attrition in this trial affects the time needed for the Chamber to decide the numerous motions filed by the parties, as well as the time required to analyse the evidence and prepare the final judgement. The progress of the *Prlić et al.* trial may be significantly delayed by a motion filed by the prosecution on 25 May 2010 to reopen its case-in-chief[1] so that it can tender as evidence excerpts of the recently discovered 18 military notebooks of Ratko Mladić.

Šešelj

15. It was forecast that the *Šešelj* trial would be completed in July 2010, but the estimate has since been revised to March 2012, reflecting a 20-month delay. After 11 months of suspension, from February to December 2009, owing to allegations of witness intimidation that are still pending before other chambers, the Trial Chamber decided, on 23 November 2009, to resume the trial on 12 January 2010. As Šešelj has consistently maintained that he would not mount a defence, the original assessment of the length of trial had been based on that representation. However,

[1] The first stage of trial when the prosecution makes its case, bringing witnesses and introducing written evidence.

Šešelj has now advised that he will bring a defence and stated that he would need two years for its preparation. This new development has had a significant impact on the anticipated length of the proceedings. The tremendous out-of-court workload generated by this case also cannot be overlooked. Since 2007, the Trial Chamber has issued approximately 333 written and 75 oral decisions. The Chamber is seized of approximately 10 to 15 motions monthly and issues an average of 10 decisions a month. The prosecution has submitted numerous motions for the admission of adjudicated facts and other evidence, which require extensive analysis by the staff and deliberations on the part of the judges. All three judges in the trial are involved in other trials (presiding Judge Antonetti is also the presiding judge in *Prlić et al.*; Judge Harhoff also sits in *Stanišić and Župljanin*; and Judge Lattanzi sits in *Karadžić*) which makes scheduling those four trials a challenge. The team of lawyers assisting the Trial Chamber on the *Šešelj* case is understaffed. At the beginning of the case, the team was composed of seven staff members. Because of significant turnover, the team currently is working on the case is composed of only four staff members, three of whom have less than six months of experience with the case and two of whom have less than six months of experience in the Tribunal. This adversely affects the work of the Trial Chamber as a whole, in particular on the rate of determining and disposing of motions and analysing evidence. This case may also be affected by the discovery of the 18 Mladić notebooks, which the prosecution has requested additional time to analyse. Owing to the magnitude of the new material, the Trial Chamber granted the prosecution until 16 July 2010 to file a motion in relation to the notebooks.

Stanišić and Župljanin

16. It was forecast that the *Stanišić and Župljanin* trial would be completed in October 2010, but the estimate has since been revised to June 2012, reflecting a 20-month delay. The pretrial assessment of the anticipated length of the proceedings was based on the limited information available at the time and is now considered to have been overly optimistic for a number of reasons. The pressing need to start this eighth concurrent trial in September 2009, coupled with the departure of three judges from the Tribunal at the same time, necessitated the creation of a bench with two permanent judges, both new to the Tribunal, and an existing ad litem judge already assigned to another ongoing case. Although the use of rule 92 witness statements has resulted in some time savings, many witnesses are still required to testify as prosecution witnesses, as their prior testimony admitted from a previous case does not include relevant evidence directly relating to the accused in this case. Recent decisions on the admission of adjudicated facts are also expected to lead to a request for further witnesses to be added. Hearings have been adjourned on three occasions, first for two weeks early in the trial to enable further preparation by both the Chamber and the parties and twice following the winter recess for one-week periods to allow the Chamber time to deliberate on some of the many outstanding motions. Progress on those matters has been hindered by a number of factors, the most relevant of which is the combination of the low level of staffing for a case of this size and complexity and the relative inexperience of the legal support team. The team consists of four staff members plus a fellow, only two of whom have more than one year of experience at the Tribunal. The prosecution has recently filed a motion to add the recently discovered 18 military notebooks of Ratko Mladić to its list of potential exhibits. If the Trial Chamber grants this motion, the case may be further delayed in order to allow the defence time to review the new material.

Stanišić and Simatović

17. It was forecast that the *Stanišić and Simatović* trial would be completed in February 2011, but the estimate has been revised to July 2012, reflecting a 17-month delay. The presentation of the prosecution's case-in-chief commenced on 29 June 2009. On 2 August 2009, the lead counsel for Simatović passed away, and the case was adjourned until a replacement was assigned. Although the new Simatović defence team requested an adjournment of eight months to prepare for the trial, the Trial Chamber granted a shorter period and the trial recommenced at the end of November. Another short adjournment was necessary in March and April to allow the new Simatović defence team to adequately prepare to cross-examine prosecution witnesses. The Chamber and its legal support staff continue to conduct this case in parallel with other cases (presiding Judge Orie and Judge Gwaunza on *Gotovina et al.* and Judge Picard on *Perišić*) by means of rigorous management of the court calendar. The case has only one legal officer assigned to it full time, and the rest of the staff providing legal support to the judges in this trial are also supporting judges in other cases. The original assessment of the length of time anticipated for this case was based on the Chamber sitting more days per week than currently scheduled and the commitment of the judges to other cases. There are also issues with the health of the accused that necessitate the case sitting shorter court times. The prosecution has recently filed a motion seeking to add to its list of exhibits the recently discovered 18 military notebooks of Ratko Mladić allegedly made from 1991 to 1995. If the Trial Chamber determines that it is in the interest of justice to grant the motion, it will take longer to conclude this case than is currently anticipated.

Karadžić

18. It was forecast that the *Karadžić* trial would be completed in February 2012, but the estimate has since been revised to December 2012, reflecting a 10-month delay. The trial commenced on 26 October 2009, and the prosecution made its opening statement over a period of two days. The accused maintained that he had not had enough time to prepare for the trial, however, and refused to attend the proceedings. As a consequence, the Chamber ordered the Registrar to appoint defence counsel to begin preparing to represent the accused at trial, and adjourned between November and March to allow sufficient preparation time. The accused challenged the selection of counsel and sought additional Tribunal resources for his own defence team. While the Appeals Chamber ultimately upheld the Registrar's selection of counsel, the President ordered that additional funds be provided for both the pretrial and trial phases. The accused then filed a motion for further postponement of the trial on the basis that he remained insufficiently prepared owing in part to the Registrar's decisions on defence funding. This motion was denied by the Chamber, and the opening statement from the accused was heard on 1 and 2 March 2010. On 1 March, however, the accused sought certification to appeal the Chamber's decision on the postponement of trial, which was granted by the Trial Chamber. The Trial Chamber also stayed the effect of its decision on postponement until the matter was resolved by the Appeals Chamber. On 31 March, the Appeals Chamber dismissed the appeal in its entirety, and the Trial Chamber subsequently ordered that the trial resume on 13 April with the hearing of the first witness. The legal team assigned to the *Karadžić* Chamber is significantly understaffed, with only four full-time legal staff plus a part-time fellow and interns. This staffing shortage will continue to have an impact on the time required to deal

with the ongoing motions and practical issues arising during the course of the trial and to carry out the necessary analysis of evidence. The prosecution has recently filed a motion seeking to add to its exhibit list the recently discovered military notebooks of Ratko Mladić. Should that motion be granted by the Trial Chamber, it may have a substantial impact on the overall length of the trial.

Tolimir

19. It was forecast that the *Tolimir* trial would be completed in December 2010, but the estimate has since been revised to February 2012, reflecting a 14-month delay. The start of the trial had been scheduled for mid-December 2009, but on 9 December the Trial Chamber ordered a postponement by at least two months because of a prosecution motion to amend the indictment and add significant new charges. The motion was granted by the Chamber and the indictment was amended accordingly. Since Tolimir's transfer to The Hague in June 2007, legal support in the case has been handicapped by the staff's responsibilities in other proceedings. Of the five staff currently providing legal support, three have significant commitments in other cases, and this inevitably sets limits on the speed with which the trial can be conducted. The judges on the bench also have commitments in other proceedings (presiding Judge Flügge in *Đorđević* and Judge Mindua in *Prlić et al.*), a situation that is anticipated to continue throughout the remainder of 2010 and beyond. In addition, Tolimir is representing himself, and the consequent need for translation into Bosnian/Croatian/Serbian inevitably protracts the proceedings.

IV. Additional resource requirements for the biennium 2010-2011

Table 1
Additional requirements by component
(Thousands of United States dollars)

	Initial appropriation	*Change*	*Estimate*
Expenditure			
A. Chambers	12 972.6	2 294.8	15 267.4
B. Office of the Prosecutor	60 620.0	17 302.8	77 922.8
C. Registry	212 853.3	28 006.2	240 859.5
D. Records management and archives	3 839.6	—	3 839.6
Total requirements (gross)	**290 285.5**	**47 603.8**	**337 889.3**
Income			
Income from staff assessment	22 020.2	5 054.2	27 074.4
Other income	277.5	—	277.5
Total (net)	**267 987.8**	**42 549.6**	**310 537.4**

Table 2
Additional requirements by object of expenditure
(Thousands of United States dollars)

	Initial appropriation	*Change*	*Estimate*
Expenditure			
Posts	130 465.6	—	130 465.6
Other staff costs	44 302.0	32 683.0	76 985.0
Non-staff compensation	12 791.4	2 294.8	15 086.2
Consultants and experts	808.4	—	808.4
Travel	4 303.7	184.0	4 487.7
Contractual services	41 743.4	7 387.8	49 131.2
General operating expenses	27 168.9	—	27 168.9
Hospitality	16.8	—	16.8
Supplies and materials	1 888.7	—	1 888.7
Furniture and equipment	4 235.7	—	4 235.7
Improvement of premises	250.3	—	250.3
Grants and contributions	290.4	—	290.4
Staff assessment	22 020.2	5 054.2	27 074.4
Total (gross)	**290 285.5**	**47 603.8**	**337 889.3**
Income			
Income from staff assessment	22 020.2	5 054.2	27 074.4
Other income	277.5	—	277.5
Total (net)	**267 987.8**	**42 549.6**	**310 537.4**

20. The overall level of resources approved for the biennium 2010-2011 reflected a reduction in posts and non-post resources in line with the projected reduction in trial activity as from the third quarter of 2010. Based on revised trial projections, the Tribunal anticipates full first-instance trial activity throughout 2010, with only a marginal decrease in the pace as from the third quarter of 2011.

21. On the basis of the reduction in trial activity projected at the time of the finalization of the budget proposals, the approved budget of the Tribunal for 2010-2011 provided for the abolition of 186 posts during the biennium, as follows: 9 posts effective 1 January 2010; 7 posts effective 1 June 2010; 2 posts effective 1 August 2010; 6 posts effective 1 October 2010; 11 posts effective 1 November 2010; 34 posts effective 1 January 2011; 109 posts effective 1 March 2011; and 8 posts effective 1 April 2011. It is proposed that the functions of the abolished posts be gradually phased out during the biennium, in line with the completion of first-instance trials. In order to ensure that the Tribunal has the flexibility to accelerate or decelerate the phasing out of individual posts, it is proposed that 35 posts be abolished as from 1 January 2010 and 151 posts be abolished as from 1 January 2011, but that funding be provided through general temporary assistance to enable critical functions of the posts to be maintained in order to support the trials to be held and completed at different dates during the biennium (see A/64/476, para. 18).

22. Current projections assume that six trials will be conducted in 2010 and the first three quarters of 2011. Accordingly, in order to ensure the steady progress and completion of trial activities and enable the Trial Chambers to optimally utilize courtroom and judicial capacity, the Tribunal would require the continuation of the functions of the posts earmarked for abolition for a total of 3,579 work-months (1,550 work-months for the Professional and higher category and 2,029 work-months for the General Service and other category), to be funded through general temporary assistance.

23. In addition, a number of non-post items in the approved budget were adjusted to account for reduced trial activity in the biennium. In view of the revised trial projections, additional provisions are requested for the following non-post items: salaries and allowances of judges, general temporary assistance, temporary assistance for translation and interpretation, verbatim reporting, travel, defence counsel fees and detention facilities, as set out in the paragraphs that follow.

A. Chambers

Table 3
Additional requirements by object of expenditure
(Thousands of United States dollars)

	Initial appropriation	*Change*	*Estimate*
Non-staff compensation	12 791.4	2 294.8	15 086.2
Consultants and experts	30.6	—	30.6
Travel	150.6	—	150.6
Total (gross)	**12 972.6**	**2 294.8**	**15 267.4**

Resource requirements

Salaries and allowances of judges

24. The estimated additional requirements of $2,294,800 under this heading would provide for honorariums for seven judges for an additional 131 work-months to support the trials in accordance with the revised trial schedule ($2,975,400), offset partly by reduced requirements under common costs of judges ($289,200) and pensions of judges ($391,400).

25. The approved budget for honorariums of judges was based on a total of 440 work-months and the departure in 2010 and 2011 of 4 permanent and 10 ad litem judges. Taking into account the latest trial schedule, the revised estimates for honorariums of judges are based on 571 work-months and the departure in 2010 and 2011 of one permanent and six ad litem judges.

26. The common costs of judges include travel on home leave, education allowance and relocation costs. Decreased requirements are due to a reduction in the number of judges repatriated during the biennium.

27. Decreased requirements for pension benefits for retired judges are due to the delayed retirement of three judges as a result of the revised trial schedule.

B. Office of the Prosecutor

Table 4
Additional requirements by object of expenditure
(Thousands of United States dollars)

	Initial appropriation	*Change*	*Estimate*
Expenditure			
Posts	35 401.9	—	35 401.9
Other staff costs	18 613.9	14 854.4	33 468.3
Consultants and experts	313.4	—	313.4
Travel	696.8	184.0	880.8
Contractual services	49.4	—	49.4
Staff assessment	5 544.6	2 264.4	7 809.0
Total (gross)	**60 620.0**	**17 302.8**	**77 922.8**
Income			
Income from staff assessment	5 544.6	2 264.4	7 809.0
Total (net)	**55 075.4**	**15 038.4**	**70 113.8**

Resource requirements

Other staff costs

28. The estimated additional requirements of $14,854,400 under this heading include:

(a) A provision of $5,344,100 for the continuation of the functions of the positions proposed for abolition in the budget for the biennium 2010-2011 for a total of 582 work-months (359 work-months at the Professional level and 223 work-months at the General Service level). It was initially proposed to abolish 73 posts in the Office of the Prosecutor during the biennium. The functions of the abolished posts were proposed to be phased gradually out as follows: (a) January 2010: 9 posts (1 P-3, 5 P-2 and 3 General Service (Other level)); (b) June 2010: 7 posts (1 P-3, 3 P-2 and 3 General Service (Other level)); (c) August 2010: 2 posts (P-2); (d) October 2010: 2 posts (1 P-3 and 1 P-2); (e) November 2010: 6 posts (1 P-4, 2 P-3, 2 P-2 and 1 General Service (Other level)); (f) January 2011: 8 posts (2 P-3, 2 P-2, 1 General Service (Principal level) and 3 General Service (Other level)); and (g) March 2011: 39 posts (3 P-5, 5 P-4, 12 P-3, 1 P-2 and 18 General Service (Other level)). In order to ensure that the Office had the flexibility to accelerate or decelerate the phasing out of posts, it was proposed that 26 posts whose functions would be phased out in 2010 be abolished as from 1 January 2010 and that 47 posts whose functions would be phased out in 2011 be abolished as from 1 January 2011, but that their funding be provided through general temporary assistance. Based on the current revised trial schedule it is proposed that 40 posts be abolished during the biennium instead of the previously planned 73, as follows: (a) January 2010: 9 posts (1 P-3, 5 P-2 and 3 General Service (Other level)); (b) June 2010: 2 posts (1 P-3 and 1 General Service (Other level)); July 2010: 1 post (D-1); October 2010: 5 posts (3 P-2 and 2 General Service (Other level)); January 2011: 4 posts (1 P-4, 1 P-3,

1 General Service (Principal level) and 1 General Service (Other level)); March 2011: 1 post (General Service (Other level)); May 2011: 2 posts (1 P-3 and 1 P-2); June 2011: 2 posts (General Service (Other level)); and October 2011: 14 posts (2 P-5, 2 P-4, 6 P-3, 2 P-2 and 2 General Service (Other level)). The remaining positions would be extended through December 2011. The funding through general temporary assistance for the above-mentioned functions is commensurate with the revised level of judicial activity for the biennium;

(b) A provision of $8,826,600 for a total of 895 work-months for the continuation of the functions of posts abolished in 2009 and subsequently funded through general temporary assistance as follows: 58 months at the P-5 level, 200 months at the P-4 level, 233 months at the P-3 level, 41 months at the P-2 level and 363 months at the General Service level (Other level);

(c) A provision of $564,000 for 84 work-months of temporary assistance (24 work-months at the P-2 level and 60 work-months at the General Service level) in order to support the revised trial schedule. This would include support in the areas of pretrial and peak-period trial support and document translation and indexing;

(d) A provision of $119,700 for an additional 2,850 hours of overtime for General Service personnel in 2011 at an average rate of $42 an hour to support four trials (*Prlić et al., Stanišić and Župljanin, Stanišić and Simatović, and Šešelj*).

Travel

29. The additional amount of $184,000 is attributable to 34 additional missions in support of a expanded 2011 trial schedule. The purpose of the missions will be to conduct further trial-related investigations, including proofing witnesses, taking testimony under rule 92 bis, investigating defence cases, serving summonses on witnesses and searching archives for documents and video-link testimony.

Staff assessment

30. Staff assessment costs are estimated at $2,264,400 relating to the general temporary assistance positions described in paragraph 28 above. Those costs will be offset by a corresponding amount under income from staff assessment.

C. Registry

Table 5
Additional requirements by object of expenditure
(Thousands of United States dollars)

	Initial appropriation	*Change*	*Estimate*
Expenditure			
Posts	95 063.7	—	95 063.7
Other staff costs	23 827.2	17 828.6	41 655.8
Consultants and experts	403.4	—	403.4
Travel	3 431.5	—	3 431.5
Contractual services	41 177.8	7 387.8	48 565.6

	Initial appropriation	*Change*	*Estimate*
General operating expenses	27 168.9	—	27 168.9
Hospitality	16.8	—	16.8
Supplies and materials	1 888.7	—	1 888.7
Furniture and equipment	2 859.0	—	2 859.0
Improvement of premises	250.3	—	250.3
Grants and contributions	290.4	—	290.4
Staff assessment	16 475.6	2 789.8	19 265.4
Total	**212 853.3**	**28 006.2**	**240 859.5**
Income			
Income from staff assessment	16 475.6	2 789.8	19 265.4
Other income	277.5		277.5
Total requirements (net)	**196 100.2**	**25 216.4**	**221 316.6**

Resource requirements

Other staff costs

31. The estimated additional requirements of $17,828,600 under this heading would provide for:

(a) General temporary assistance ($16,431,700) as follows:

(i) The provision of $8,724,500 would provide for the continuation of the functions of the positions proposed for abolition in the budget proposal for the biennium 2010-2011 for a total of 1,130 work-months (413 work-months at the Professional level and 717 work-months at the General Service level). It was initially proposed that 113 posts be abolished in the Registry during the biennium 2010-2011 as follows: (a) October 2010: 4 posts (2 P-5, 1 P-4 and 1 General Service (Other level)); (b) November 2010: 5 posts (1 P-2 and 4 Security Service); (c) January 2011: 26 posts (2 P-4, 2 P-3, 4 P-2, 6 General Service (Other level) and 12 Security Service); (d) March 2011: 70 posts (1 P-5, 6 P-4, 11 P-3, 12 P-2, 16 General Service (Other level) and 24 Security Service); and (e) April 2011: 8 posts (Security Service). In order to ensure that the Registry had the flexibility to accelerate or decelerate the phasing out of individual posts, it was proposed that 9 posts whose functions would be phased out in 2010 be abolished as from 1 January 2010 and 104 posts whose functions would be phased out in 2011 be abolished as from 1 January 2011. Based on the current revised trial schedule, it is proposed that 20 posts be abolished during the biennium instead of the previously planned 113, as follows: October 2010: 2 posts (P-5); January 2011: 1 post (Security Service); March 2011: 2 posts (General Service (Other level)); May 2011: 3 posts (2 P-2 and 1 General Service (Other level)); and October 2011: 12 posts (4 P-2, 6 Security Service and 2 General Service (Other level)). The remaining positions would be extended to December 2011. The funding through general temporary assistance for the above-mentioned functions is commensurate with the revised level of judicial activity for the biennium;

(ii) The provision of $6,705,400 would provide for 972 work-months for the continuation of the functions of posts abolished in 2009 and subsequently funded through general temporary assistance as follows: 10 months at the P-4 level, 116 months at the P-3 level, 120 months at the P-2 level, 494 months at the General Service level (Other level) and 232 months at the Security Service level;

(iii) The provision of $931,300 would provide for 104 work-months of temporary assistance for the Chambers Legal Support Section to allow it to cope with the pace of first-instance trial activity (20 months at the P-3 level, 60 months at the P-2 level and 24 months at the General Service level (Other level);

(iv) The provision of $70,500 would provide for 12 work-months at the General Service level (Other level) for a team of locally recruited interpreters in the field offices to cover at a lower cost part of the workload usually undertaken by externally contracted short-term interpreters;

(b) Temporary assistance for meetings ($1,396,900) as follows:

(i) Temporary assistance for interpretation ($1,125,500), representing 1,175 additional workdays, would be required under this heading in order to support additional requirements for interpretation services in the three working languages, namely, English, French and Bosnian/Croatian/Serbian, and in other languages (e.g., Albanian and Macedonian), resulting from the revised trial schedule for the biennium;

(ii) Temporary assistance for translation ($271,400), representing 520 additional workdays for the services of translators and revisers to translate legal documents submitted by the Office of the Prosecutor, the Registry and the Chambers in various language combinations (English, French and Bosnian/Croatian/Serbian), resulting from the revised trial schedule for the biennium.

Contractual services

32. In view of the revised trial schedule, an additional amount of $7,387,800 under this category is required to provide for the following:

(a) Detainee services ($1,201,100) for the continued rental of 12 cells originally due to be returned in December 2010. The United Nations Detention Unit will therefore continue to rent 64 cells until 1 November 2011. The additional resources will cover the lease of cells and services from the host Government for detainees for the 12 additional cells;

(b) Defence counsel fees ($3,659,700) to provide counsel fees ($3,253,700) and travel expenses ($406,000) for an average of 34 accused who are indigent, who will be in trial and appellate proceedings before the Tribunal during the biennium. Although the number will be only marginally higher than in the original proposal (34 instead of 33) because of the slippage in the trial schedule, more accused will still be on trial rather than in appellate proceedings. As the cost of remunerating defence counsel is significantly higher in the trial phase than in the appeal phase, the revision of the trial schedule does have a financial impact on defence counsel fees;

(c) Contractual translation ($150,000) for the translation of an additional 3,000 pages of non-confidential documents submitted in languages other than the working languages of the Tribunal or outsourced to reduce translation backlogs;

(d) Contractual verbatim reporting ($2,377,000) to cover English and French court reporting services for oral proceedings in courtrooms as well as plenary sessions of judges and other meetings requiring transcripts. The estimate corresponds to the cost of an additional 474 courtroom days for both English and French services.

Staff assessment

33. Staff assessment costs are estimated at $2,789,900 relating to the general temporary assistance positions described in paragraph 31 above. Those costs will be offset by a corresponding amount under income from staff assessment.

V. Actions to be taken by the General Assembly

34. **The General Assembly is requested to:**

(a) **Take note of the present report;**

(b) **Approve an additional appropriation in the amount of $47,603,800 gross ($42,549,600 net) to the Special Account for the International Tribunal for the Former Yugoslavia for the biennium 2010-2011.**

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Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

Report of the Secretary-General

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I. Introduction

1. The present report has been prepared pursuant to paragraph 5 of General Assembly resolution 62/68, in which the General Assembly invited Governments to submit comments on any future action, in particular on the form of the articles on prevention of transboundary harm from hazardous activities and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, bearing in mind the recommendations made by the Commission in that regard, including in relation to the elaboration of a convention on the basis of the draft articles, as well as on any practice in relation to the application of the articles and principles.

2. The Secretary-General, in a circular note dated 20 February 2008, drew the attention of Governments to resolution 62/68, and a reminder was sent out in March 2010. As at 30 June 2010, responses had been received from Austria, Belarus, Germany, Mexico, the Netherlands, New Zealand, Panama and Portugal.

II. Comments and observations received from Governments

Austria

3. With regard to the draft articles on the prevention of transboundary harm from hazardous activities (General Assembly resolution 62/68), Austria was of the view that it would be very useful to take into account the existing practice of States when considering the ultimate form of the draft articles. Reports on State practice would allow for a better assessment of the draft articles and could, together with the draft articles, serve as a basis for discussions in a working group established by the Sixth Committee of the General Assembly on the possibility of a convention.

4. As to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (General Assembly resolution 61/36), Austria was of the view that their current form did not allow for a similar approach. Austria preferred to postpone a decision on the ultimate form of the draft principles and to continue to monitor developments in State practice. Austria proposed that the topic be placed on the agenda of the Sixth Committee again in six years' time with a view to assessing whether any action should be taken as to the form of the draft principles.

Belarus

5. Belarus stated that the conceptual bases of the draft articles and the fundamental provisions of the principles were almost entirely reflected in its legislation. Belarus was a State party to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, the fundamental principles of which were largely mirrored by the corresponding provisions in the draft articles and principles. In this regard, it could be concluded that Belarus had established a sufficient legal framework for the implementation of the draft articles and principles.

6. With regard to the advisability of formulating an international agreement, in the view of Belarus it would be wise to proceed on the premise that transboundary harm might lead to political tension and have a significant social impact. Matters of compensation for loss might involve significant financial obligations. In this regard, it would be highly appropriate to establish a clear and predictable international legal regime in that area, based on a legally binding international agreement.

Germany

7. Germany welcomed the draft articles on the prevention of transboundary harm from hazardous activities. In principle, it supported the codification of the draft, as this could be a contribution to the further development of international environmental law. In particular, codification could create legal security and enshrine the principle of reciprocity according to which States need to take preventive steps to benefit their neighbours.

8. In the view of Germany, it must be ensured that an agreement based on the draft articles would be subsidiary to the more specific agreements already in existence (for example, the Convention on International Liability for Damage Caused by Space Objects).

9. With regard to the drawing up of a convention, Germany was of the view that the wording of some of the very broadly formulated articles should be reconsidered. For example, it remained unclear what the term "significant" was intended to mean as used in draft articles 1 to 3. While the introduction of a relevance threshold in damage assessment was wholly to be welcomed, the term used remained completely vague. Without more precise definition, codification would represent no significant progress when compared with customary law, which had been shaped by decisions on individual cases (*Trail Smelter*, *Lake Lanoux*). For that reason, an attempt should be made to reach a more precise definition to open the way to uniformity.

10. Furthermore, the broad wording of draft article 2 would require further examination in the light of the need for authorization pursuant to draft article 6. The approach laid down in draft article 6 (1), according to which all activities involving a risk required prior authorization, ran counter to German practice, according to which products could be placed on the market in principle without authorization, with control proceedings thereafter being ameliorative.

11. Germany took note of the principles on the allocation of loss, but did not see any need to comprehensively codify the regime governing environmental liability. Agreements specific to individual sectors were preferable, as they would take account of the particular features of the respective branches (oil pollution, hazardous waste, genetically modified organisms). Germany pointed to the existing United Nations Environment Programme guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment, which were generally welcomed as non-binding regulations and which could make an important contribution to environmental liability law at the national level.

Mexico

12. Mexico reiterated its opinion that the best mechanism for the effective implementation of the draft articles and principles in question would be the establishment of a general and binding regime, which could be achieved in the medium term through an international convention. Once such a convention was in place, each State would be required to incorporate it into domestic law.

13. Mexico expressed the view that the two aspects of the work of the Commission on the subject should be treated together in a single legal instrument.

14. Mexico emphasized that, should the General Assembly decide to elaborate a convention on the subject, the negotiating committee established for that purpose would have to review and reformulate many of the provisions in order to include aspects that were not addressed by the Commission, such as harm to areas beyond national jurisdiction. The purpose of such a reformulation would be to ensure that the international instrument was in line with contemporary international environmental law and corresponded to the current needs of the international community.

15. Mexico also reiterated that the substance of the comments and statements it had made during the consideration of the draft articles and principles by the Commission remained valid.

Netherlands

16. The Netherlands stated that it supported the main thrust of the draft articles on the prevention of transboundary harm from hazardous activities, which by and large reflected customary international law. However, it was of the view that the Commission should make further efforts to codify and progressively develop the law in that area. In particular, further thought should be given to the elaboration of provisions on environmental impact assessments, access to information, public participation and access to justice. International developments since the completion of the work on that aspect of the topic had strengthened the conviction of the Netherlands that the draft articles did not fully reflect the state of the law.

17. The Netherlands also supported the main thrust of the draft principles on the allocation of loss. The Netherlands agreed with the underlying notion of the draft principles, namely, that the question of international liability for transboundary harm also arose in the event that a State had complied with its international obligations relating to an activity carried out under its jurisdiction or control. That was a gap in international law, and the draft principles sought to fill the gap through the provision that States should take all necessary measures to ensure the availability of prompt and adequate compensation for victims of transboundary damage caused by hazardous activities. As for the measures that needed to be taken, the Netherlands generally supported the set of procedural and substantive minimum standards identified in the draft principles, which should be incorporated into domestic law.

18. With regard to the final form of the work on the topic, the Netherlands reaffirmed its position that the form of the work on the liability aspects should not be different from that on the prevention aspects. The Netherlands did not support the differentiation between the final form of the work on the prevention aspects, which

was to take the form of a draft convention, and the final form of the work on the liability aspects, which had taken the form of draft principles. It was of the view that, at a minimum, the obligation of States to take necessary measures to ensure that prompt and adequate compensation was available for victims of transboundary damage caused by hazardous activities should be incorporated into the draft articles on prevention. It could be supplemented by guidance in the form of principles, but should itself take the form of an obligation to ensure that innocent victims of transboundary damage would not be left uncompensated.

New Zealand

19. New Zealand welcomed the adoption by the General Assembly of resolutions 61/36 and 62/68 on the prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm. The principles and articles respectively attached to those resolutions represented the culmination of extensive work by the Commission.

20. New Zealand considers that, by adopting resolutions 61/36 and 62/68 and commending the principles and articles to Governments, the General Assembly had already confirmed their status as authoritative guidance for the conduct of all States in relation to the prevention of transboundary harm and the allocation of loss in the event of such harm. New Zealand was confident that the stature and influence of the principles and articles would continue to grow as they were referred to by Member States in the conduct of their activities and their international relations and drawn on by courts and tribunals at both the domestic and the international levels. In this regard, New Zealand noted that the draft articles (in their 2001 form) were referred to by the International Court of Justice in its judgment in the case concerning *Pulp Mills on the River Uruguay* (*Argentina* v. *Uruguay*).

21. In the view of New Zealand, there was at present no added benefit in attempting to transform the principles and articles into the more binding form of a convention. That would be a helpful step only if at some future time there was broad and unified support for it by Member States. New Zealand considered it best simply to acknowledge and reiterate that the articles and principles in their present form were a major contribution to the achievement of a consistent, coherent and fair international regime for transboundary harm from hazardous activities and that they would continue to grow in significance.

Panama

22. Panama stated that, as a result of its geographical situation, it served as a transit point between the Pacific and Atlantic Oceans, making it one of the most heavily used routes in the world by vessels transporting oil and gas for storage and sale at the national and international levels. Accordingly, there were increased threats to the environment and its natural resources from spillage.

23. Since Panama was a transit point for fuel, it had an extensive port infrastructure. Panama had a total fuel storage capacity of 710.1 million gallons (16.9 million barrels), of which 98.5 per cent was in the ports. Some of the port facilities were located very close to the border with Costa Rica, which meant that an

oil spill could affect sectors of that country. A spill could also occur in areas in proximity to the border with Colombia.

24. Furthermore, Panama had protected wildlife reserves in border areas or in close proximity to them. These were nature reserves, which were home to many different species of flora and fauna, divided among a variety of ecosystems, ranging from coastal to mountain. At times those ecosystems had been harmed by forest fires caused by subsistence activities.

25. Panama did not have a statistical record of environmental emergencies in the border areas, but in some areas where land access was uninterrupted, there were increased environmental risks from, for example, the transit of hazardous substances, such as oil and oil derivatives.

26. According to the precautionary principle, lack of empirical evidence relating to potential damage is not a valid reason for failing to establish the rules necessary to prevent the occurrence of harm.

27. A consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm should be based on an economic (social, environmental and financial) evaluation of the environmental damage which has occurred, with due compensation to the affected country. To that end, it was necessary to establish a baseline before and after harm occurs, in order to have available the information necessary to assess the loss resulting from any environmental harm that may occur.

28. In the view of Panama, the rules regarding the control and prevention of harm arising out of such activities should be established and agreed in writing, in advance, by the parties. Accordingly, all transboundary movement should be subject to the undertaking that the party responsible for the pollution would compensate the affected party. Thus, in the event of environmental harm in the importing or transit country, the exporting country would automatically be jointly and severally liable for the environmental harm it caused.

Portugal

29. In the view of Portugal, the adoption of the draft articles and principles by the General Assembly was a positive step towards the establishment of measures allowing for prompt and adequate compensation to victims of transboundary damage and of measures to minimize the harm and loss which could result from incidents involving hazardous activities.

30. Portugal considered that the item should be analysed in the light of the history of the topic and the purposes of the codification and progressive development of international law.

31. Liability was one of the categories of international responsibility. Although it was widely accepted that international responsibility and the obligation to make reparations for wrongful acts had a solid basis under customary norms, such was probably not the case with liability for lawful acts, which was more exceptional in nature and dependent on conventional rules. Thus, it might not be wise to advance too much in the area of liability while no definitive final action was taken on the topic of responsibility of States for international wrongful acts.

32. The prevention and liability aspects of the topic should be dealt with together in terms of their legal nature and enforceability. If the purpose of the set of draft articles dealing with prevention was to create a legal obligation on the part of States to prevent transboundary harm, it would be logical and appropriate to impose on States the legal obligation to take the measures necessary to ensure prompt and adequate compensation and to minimize the harm and loss which might result from incidents involving hazardous activities. When a State violated its obligation to take such measures, it should also incur an international responsibility.

33. If the will of the international community was, for the moment, to cast the subject in the form of principles, then the formulation of the draft articles and principles would have to better reflect their soft-law and more general character. In such a case, the structure of the principles on liability should be drafted as a true declaration of principles, not in the guise of a convention. Within the framework of that option, the draft articles on prevention would also have to be revisited in order to guarantee a coherent set of principles.

34. Portugal expressed the hope that one day it would be possible to have a single convention on international liability for injurious consequences arising out of acts not prohibited by international law with regard to which the responsibility of the State was adequately assumed and a real system of compensation due as a result of the effects of lawful activities of States was put in place.

35. For the time being, for the sake of coherence, it would be an important step to achieve a whole set of draft articles or principles on both prevention and allocation of loss.

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Report of the Secretary-General

Addendum

United States of America

1. The draft articles of the International Law Commission on prevention marked a positive step towards encouraging States to establish means to address such issues as notification in specific national and international contexts. The principles on allocation of loss are also a positive step towards encouraging States to establish mechanisms to provide prompt and adequate compensation for victims of transboundary harm. The principles incorporate progressive ideas such as the responsibility of operators, the desirability of backup financial security measures, the importance of prompt response measures, and broad concepts of compensable harm. They also stress the importance of national, bilateral, regional and sectoral arrangements to carry out these ideas. The Commission urged States to take national and international action to implement the principles, and we similarly urge national action and State-to-State agreements in specific contexts, as that is what the principles were designed to encourage.

2. The General Assembly has commended both the draft articles on prevention and the principles on allocation of loss to the attention of Governments and invited comments on their form. The United States strongly supports retaining these products in their current form. Both the draft articles and draft principles go beyond the present state of international law and practice, and are clearly innovative and aspirational in character, rather than descriptive of current law or State practice. Both documents were designed as resources to encourage national and international action in specific contexts, rather than to form the basis of a global treaty.

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3. Accordingly, the United States continues to believe it is most appropriate for the work on prevention to remain formulated as draft articles and for the principles to take the form of non-binding standards of conduct and practice. Retaining the current, recommendatory form of these draft articles and principles increases the likelihood that they will gain widespread acceptance and fulfil their intended purpose.

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